85-704

No. 85-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUBERT CALL and RUTH CALL,
Petitioners,

v.

City of Albany, California; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; Cebert Properties, Inc.; BRUCE THOMSON, ROBERT SCHARF, DARIO C. MENIKETTI, LOUIS H. BELL, JERRY J. LEAHY, THELMA RUBIN, BLANCHE VRANNA, ROBERT B. ELLIOTT, and CATHERINE J. WEBB, residents and taxpayers of the City of Albany, California,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Is the Due Process clause of the Fourteenth Amendment violated by a state conflict of interest statute whose operative term is not statutorily defined and which, upon application, works a $500,000 forfeiture upon a City Councilman?

2. Is the Establishment Clause of the First Amendment violated when a civic park is burdened with a Christian cross?

PARTIES TO THE PROCEEDINGS

HUBERT CALL and RUTH CALL,

Petitioners,

v.

City of Albany, California; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; Cebert Properties, Inc.; BRUCE THOMSON, ROBERT SCHARF, DARIO C. MENIKETTI, LOUIS H. BELL, JERRY J. LEAHY, THELMA RUBIN, BLANCHE VRANNA, ROBERT B. ELLIOTT, and CATHERINE J. WEBB, residents and taxpayers of the City of Albany, California,

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v.

CITY OF ALBANY, CALIFORNIA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners, HUBERT CALL and RUTH CALL, hereby respectfully request that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of California entered on May 23, 1985 with rehearing denied on July 29, 1985.

OPINION BELOW

The decision of the California Supreme Court is reported at 38 Cal.3d 633, 214 Cal.Rptr. 139 (1985) and appears as Appendix 1a-25a in its unchanged form after denial of rehearing.

JURISDICTION

This petition for certiorari is taken from a judgment entered on May 23, 1985, by the Supreme Court of the

State of California. A timely petition for rehearing was denied on July 29, 1985.

The statutory provision believed to sustain the jurisdiction of this Court is set forth in 28 U.S.C. section 1257, which provided in relevant part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) * * *
>
> (2) * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States.

STATUTES AND AMENDMENTS INVOLVED

Cal. Gov. Code section 1090, which provided as follows:

> Members of the legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
>
> As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

U.S. Const. Amend. I, which provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise, thereof, * * *

U.S. Const. Amend. XIV, section 1, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a taxpayer's suit in which the trial court found that, while no intentional wrongdoing occurred, City Councilman HUBERT CALL and his wife, RUTH CALL, were required to forfeit all the proceeds of a sale of land by them to a real estate developer. The fee to that land was given by the developer to the City of Albany, together with two other parcels to form a 7½-acre park at the top of Albany Hill.

The Albany Lions Club, Lions International own a 21-foot cross that stood on CALL's land at his pleasure before the sale. Councilman CALL asked the developer to protect that cross, and with little concern for the "establishment" clause problem which would be created by giving a California chartered city a park surrounding a huge cross, the developer allowed a deed of easement to be recorded "for ingress and egress to maintain the existing cross." The Lions Club is the grantee of that easement. Long

before that deed was given they had conducted Christian religious services at the foot of that cross. These services continue to the present throughout the 11 years that the park has existed. The Lions also illuminate their cross throughout the Christmas and Easter seasons and as a vigil light in times of need. During the Iranian hostage crisis it remained lit continuously.

The developer's gift of this park grew out of an offer he made to the city to give them either a park on the edge of Cerrito Creek or a park at the top of Albany Hill to be assembled by the developer using $600,000 of the developer's money, but not both. In return for that choice between two park alternatives the developer obtained the various permits needed to construct a 2,500-unit apartment complex at the southwestern base of Albany Hill adjacent to Highway 80. The resulting Gateview Apartments now provide 10% of the tax revenue of Albany, and if the project had been fully built, about 25% of the city's revenue would be due to that huge complex.

In view of the financial risk that massive development presented to the banks, it was the lender's requirement that land at the top of the hill zoned for multiple dwelling development be made unbuildable. The developer planned to acquire that land at a cost of about $1 million. (R.T. 706) When the city fathers selected the hilltop park option, the developer was given absolute discretion concerning which land he could buy. The 200′ meridian which is the lower limit of the permissible purchase includes land of various owners below Taft Street and three principal owners plus the developer above Taft Street. The most logical choice for the park included land owned by a family corporation called "Golden Gate Hills Development Corporation." Had that parcel been acquired it would have satisfied the $600,000 plan requirements, and the CALL

lands with the Lions Club's cross would have been left out of the park. When the city accepted the $600,000 park plan (as opposed to the Creekside Park) Councilman CALL abstained from voting and debating. He had been advised to abstain by the city attorney because his land was within the 200′ level, and it could have been purchased.

The $600,000 plan provided that if the developer could not get the land he wanted by negotiation, he would give the unspent funds to the city *earmarked* for acquisition of land for a park, with the city to exercise its eminent domain power to acquire the land. The CALL land is located in an area master planned for a future park.

Neither alternative required the CALL lands would be acquired.

The trial judge observed on January 11, 1978 that the City had absolutely no contractual right to demand that the developer buy the CALL lands to perform his contract:

> Now, with Exhibit 4 and Exhibit 7 (the developer's two November, 1972 letters) and Exhibit 24 we have an agreement between the City and IGC. Thereafter, as the evidence reveals, everything that was done was done in accordance with and pursuant to that agreement. If the City had attempted to guide IGC in how it expended the $600,000, the City would have been breaching the agreement.
> (R.T. 560, line 27 to 561, line 4.)

The developer's secret intention was to use the $600,000 gift plan as an anti-competition tool backed by the City's power of condemnation to coerce the owners to land zoned for multiple dwellings to sell to him at a discount price. Giving various land to the city was incidental to him. The important value to him was to eliminate land which could

be developed in competition with his huge project. When Councilman CALL asked to have the Lions Club's cross protected, the developer agreed. He testified that he did not care if the city refused to take that land—he'd keep it himself. (R.T. 691, 705, see findings 33 and 46) His concern was to forbid competitive development.

The land he gave to the city was *not the same* as the land he bought! It must be remembered that all the land the developer bought was zoned for multiple dwelling development. Before giving the city hollow legal titles to the ground, the developer stripped *all* the land in the $600,000 plan of all development rights. From a business point of view, the only value to land is the *right to build.* The developer gave the city land which had been shorn of the right to build. The CALL property was covered with a religious easement imposed on *each* of the 18 lots within that purchase (Exhibit H). The other property given to the city was subjected to a right of reverter if the city attempted to build *anything* on it for 99 years. Exhibit 7 (the developer's letter of November 12, 1972) and page 3 of the conditions of his purchase attached to the letter spell out a covenant running with the land that forbids all use other than park use for 99 years:

> THE COURT: . . . [T]hat $600,000 would never have been available and would never have become funds of the City of Albany had the City not accepted the conditions which were attached to it, and the City did accept those conditions through the actions of the City Counsel at the meeting of November 13th, as reflected in Exhibit 24 minutes of that meeting. (R.T. 560)

CALLS' ownership of this land had been well publicized. For example, in the spring of 1972, Catherine Webb (one of the plaintiffs here) conducted a public

gathering and "walk on Albany Hill" which attracted a large crowd. (R.T. 572) City Councilman HUBERT CALL pointed out his land to his group. (R.T. 573) Later that year, the "Overlook Park" idea was brought before the Albany City Council. Again, Mr. CALL publicly announced his holding on the Hill. (R.T. 542) The park was proposed by Ruth Meniketti, wife of another plaintiff here (R.T. 542, also see defendant IGC's Exhibits D and F) following a study by the Park and Recreation Committee that had been going on since 1971. (R.T. 8, Finding 12) The plaintiff group attended City Council meetings regularly, and they conspicuously followed this project. (R.T. 94-95) It was their practice to point out that Councilman CALL owned land on Albany Hill whenever the Hill was discussed by the City Council. (R.T. 246)

Mr. CALL likewise took every occasion to discuss his land ownership on the record of City Council meetings. (See R.T. 245 beginning at line 28):

> Q. And frequently as the various matters came up, where Councilman CALL felt potentially that his property might be involved, he would speak up publically, would he not?
>
> A. He brought that forward many times, that's right.
>
> Q. And at these meetings the general public is invited, isn't that true?
>
> A. Yes.

The City Attorney discussed the disclosures at page 447 and 448, (See 448 1 12 et seq.) and quoted the councilman:

> Q. Now, according to your own recollection of the City Council minutes, did Mr. CALL raise any ques-

tions as to the propriety of his participating in any such discussion or any vote on that plan?

A. Yes, as I indicated before, that the CALL property was involved and that's why I felt that it was the Hill property, Overlook Park, and he asked whether or not he could vote and I said no.

Q. He also asked, did he not, whether or not he could participate at all in the discussions?

A. I think my advice was that he should not.

Q. And that is reflected, is it not, in the minutes there of August 28th?

A. Yes.

REASONS FOR GRANTING THE WRIT

I. CALIFORNIA GOVERNMENT CODE SECTION 1090 GOVERNING CONFLICT OF INTEREST SITUATIONS IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

It is well established that civil statutes may be invalidated if they are found to be unconstitutionally vague. *Small Co.* v. *American Sugar Ref. Co.*, (1925) 267 U.S. 233, 239. "Vagueness" has been defined as whether in certain respects "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Const. Co.* (1926) 269 U.S. 385, 391. California courts have also adopted this definition of vagueness. *See McNurty* v. *State Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766.

The essence of the void for vagueness doctrine is to prevent an individual from sustaining harsh penalties by providing very clear guidelines thereby providing adequate and fair notice, as to what conduct is specifically proscribed. *Grayned* v. *City of Rockford* (1972) 408 U.S.

102, 109. *See The Void-For-Vagueness Doctrine in the Supreme Court* (1960) 109 Univ.Pa.L.Rev. Where a defendant can prove that he could not reasonably have understood that his contemplated conduct was prohibited, he may successfully assert unconstitutional statutory vagueness. *United States* v. *National Dairy Products Corp.* (1963) 372 U.S. 29, 32-33.

Petitioners contend that California Government Code section 1090, which embodies California's fundamental conflict of interest legislation, is unconstitutionally vague on its face. Section 1090 provides:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
>
> As used in this article, "district" means any agency of the State formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

The words "financially interested" are impermissibly vague because they do not specifically provide *to what extent* such interest is prohibited. What is deemed a "direct" interest has posed no problems. The law is clear that where the public official was also the contracting party, or a partner or substantial shareholder of the contracting entity, such offending contracts were void.

Similarly, what conduct is permitted in spite of section 1090 is easily discernible. Government Code section 1091 carefully delineates all permissible relationships which an official may share with the contracting party without

running afoul of section 1090, by deeming such interests as validly "remote." Another exception to section 1090 is found in section 1091.1, whereby an official shall be permitted to subdivide land he owns or in which he has an interest provided that he gives full disclosure to the pertinent official body and abstains from voting on such related matters. Thus, it appears that the official may potentially benefit from such subdivision as long as he adheres to the disclosure and abstention requirements. Finally section 1091.5 carves further exceptions to liability under section 1090.

The problem with section 1090 is what "indirect" interests are expressly prohibited. The statutes are ambiguous, the case law equally so, offering little guidance to officials who must know what indirect interests are not so safely remote as to be outside the scope of section 1090. Officials cannot receive fair and clear warning of such proscribed conduct which is violative of due process concerns of the Fourteenth Amendment of the U.S. Constitution. To the extent that section 1090 sets a potential trap for even the wary official who may act in good faith, honestly, fairly and openly, section 1090 must fail for vagueness. It has failed to protect officials from arbitrary and discriminatory governmental action.

Therefore, petitioners respectfully request that this Supreme Court grant certiorari to review California's conflict of interest laws.

II. CALIFORNIA GOVERNMENT CODE SECTION 1090 AS APPLIED IN THE CONTEXT OF THESE FACTS IS UNCONSTITUTIONALLY VAGUE AND THE $500,000 FORFEITURE PUNISHMENT IS FORBIDDEN

Assuming arguendo that California Code Section 1090 is not impermissively vague on its face, petitioners con-

tend that the statute, as applied to the facts in petitioners' case, was enforced in an arbitrary and discriminatory manner. The California Supreme Court (Court) affirmed the trial court judgment that petitioners CALL had violated section 1090. The prohibited "interest" was found in a series of events which began in November of 1973 when Interstate General Corporation (IGC—developer) offered to give to the City of Albany (city) a choice of two park sites in exchange for obtaining use and building permits to erect 2,500 apartment units on its property.

One park proposal relating to four acres of "Creekside Park" is *not* related to any land owned by petitioners. The alternative proposal by the developer could have resulted in the purchase of petitioners' land. It was an offer by the developer to expend $600,000 of its *own funds*, with total discretion in the developer, to purchase some hilltop land to which it would add a couple acres of its land. The entire parcel would then be conveyed to the city for use as a park.

Fearing a possible violation of section 1090, petitioner, who has a sixth grade education, sought the advice of the city attorney from the onset. The city attorney opined that petitioner would not violate section 1090 by the possible acquisition of his land by the developer. However to be absolutely circumspect, the attorney advised petitioner to make a full public disclosure of his land holdings on top of the designated hill and to abstain from discussing or voting on any measure which might affect his property interest. Petitioner carefully complied.

The city council selected the $600,000 plan on November 13, 1973 without petitioner's vote, thus a contract was formed. In June of 1974, the developer through its agent contracted with petitioners to buy their land in

performance of its agreement with the city, but subject to the city's completion of performing its contract to issue the building permit. Having completed the purchase of sufficient hilltop lots, the developer, now owner of those acreage, deeded to the city its hilltop property in performance of its contract. The developer was granted the coveted building permit.

The Court concluded that petitioner had violated section 1090 without truly determining whether or not it was direct or indirect. (38 Cal.3d ____, 214 C.R. at 146). It based its conclusion on the finding that "purchase of the CALLS' parcel was clearly part of a previous arrangement" (*Id.* at C.R. 145) and that "CALL sold property to the city, using IGC as a conduit." (*Id.* at C.R. 146)

There is absolutely *no* evidence to support this finding that a "previous arrangement" had existed between the developer and petitioners. The trail court made no such finding. In fact, no prior relationship, understanding, or agreement of any kind existed between those two parties. It was not until the developer made an offer to purchase petitioners' land in performance of its city contract that a relationship was finally established. This point was respectfully raised in a petition for rehearing to the Court. Respondent's reply papers were silent on this point.

This grievous error by the Court was the basis of its subsequent holding that petitioner had "sold" his property to the city vis-a-vis the developer as a conduit. Once again the record is devoid of any evidence even suggesting that the developer was an agent for petitioner. The Court also ruled that the developer was *not* an agent or trustee of the city. The only logical explanation of how the developer could have become the alleged conduit of peti-

tioner is if we were to assume that this entire series of transactions was originally conceived and initiated by the petitioner who somehow contrived to "sell" his land to the city through a complex transaction. But the record is clear of any inference of wrongdoing by petitioner.

Although the Court labelled petitioner as the "seller" of this land to the city, the decision repeatedly refers to the contract as between the developer and the city, and to IGC's purchase . . . from the CALLS . . .", all the while denying that the developer was an agent or trustee for the city. If petitioner truly was a "seller" then it necessarily follows that the city must have been a buyer. Yet the $600,000 never belonged to the city. The developer used *its* private funds to purchase targeted property. The developer had *full discretion* in choosing the realty to purchase and the amount it wished to expend for it. The $600,000 figure was determined solely by the developer who quite possibly viewed it as a $400,000 savings since it had theorized that it would have to expend nearly one million dollars to acquire hilltop lots to prevent any competing development. Acquisition of petitioners' land was not necessarily essential in fulfilling its contractual obligations. In fact, failure to obtain petitioner's land would not have been fatal if it had been able to acquire other adjacent land from a third landowner.

Given these facts, and given no evidence whatsoever of any previous "arrangement" between the developer and petitioner, the Court erred in concluding that petitioner had sold his land to the city in violation of section 1090. This decision is in direct contravention to the rules established in *Escondido Lumber* v. *Baldwin* (1906) 2 Cal. App. 606, 608, and in *City of Oakland* v. *California Const. Co.* (1940) 15 Cal.2d 573, 577 that an official may not be held culpable under section 1090 if the conflict arose *after* the

award of the contract, and no express or implied agreement existed between the official and the contracting entity.

The facts indicated that at the time of the agreement in which the city accepted developer's $600,000 plan, petitioner's interest was clearly not direct, nor could it be said that it was impermissibly indirect. Petitioner had a future, potential interest in the contract. It was never certain that petitioner's land would necessarily be involved, as other lands owned by others could have fulfilled the developer's goals. But even if petitioners' land were considered by the developer, it was never certain whether or not any offers would have been acceptable or whether a sale could have been consumated. Under these facts, it cannot be said with such finality as did the Court that ". . . the prospect that performance would involve acquisition of the CALLS' and conveyance of that land to the city was contemplated by all parties." (214 Cal.3d at C.R. 1)

Petitioners contend that relying on *Escondido, supra,* they participated in the spring and summer of 1974 *only* in the performance of an already existing contract between the developer and the city. Petitioner further contends that such participation in the performance of a contract, absent a prior arrangement, has never previously been considered as a prohibited interest in California, nor in decisions reported in many other states. *See People* v. *Deysher* (1934) 2 Cal.2d 141. *See also, Kaufman, California Conflict of Interest Laws* (1963) 36 So.Cal.L.Rev. 186, 197-98.

By adhering to the fiction that some kind of prior arrangement must have existed between petitioner and the developer the Court imposed a cruel forfeiture upon

petitioner. Moreover, the Court failed to permit petitioner leave to amend his complaint to include an equitable estopel defense. Perhaps in recognition of the unjust and nightmarish result, the Court apologetically admitted on two separate occasions:

> the resulting forfeiture seems harsh under the facts of this case. CALL was found not to have committed fraud, actual or constructive, or to have conspired to violate section 1090. Indeed, he did seek and obtain advice from the city attorney on certain occasions, and he did follow the specific advice he received. No evidence in the record supports an inference that CALL actually initiated the entire transaction. 214 C.R. at 147;

and again at page 149:

> . . . the forfeiture in this case is undeniably harsh in light of the absence of fraud and CALL's partial reliance upon advice given by the city attorney.

After a lengthy discussion about less punitive and more just remedies which could have been made applicable to petitioner, the Court fell back on the public policy argument that only a painful result will effectively frighten officials from committing violations of conflict of interest laws. Petitioners had become sacrificial lambs.

The irony, the great injustice here is that Petitioner, with only a sixth grade education, who had worked so hard over the years to acquire some realty as well as attain a public position, was aware that the transaction being contemplated by the developer could have invoked the prohibitions in section 1090. Hence, he very carefully sought the advice of the city attorney, a presumed expert on such conflict of interest mattters, and meticulously followed his counsel. How was petitioner to have known that he could not have safely relied on the city attorney's

advice? And that such purportedly erroneous advice was not remediable due to immunity afforded municipalities and government attorneys, pursuant to California Government Code sections 822.2 and 815 respectively? How was he to have known that he should have retained private counsel who *may* have recommended that he simply await possible eminent domain proceedings by the city? And how could he, a councilman of modest means in a rather small blue-collar town in California, have afforded all this private legal advice? Finally, how could he have foreseen that the courts would misconstrue the events, perhaps even find facts where none existed, to find him guilty of violating the law, despite his earnest and reasonable efforts to do everything "right" under these circumstances?

Harsh results have followed from the Court's failure to treat indirect interests differently from direct interests. *See Conflict of Interest In Public Contracts* (1956) 44 C.L.R. 355, 367. Further evidence of the ambiguity of the proscribed "indirect" interest is found in an opinion by the California Attorney General which advises that it is *not* a conflict of interest for a county supervisor, who is also a real estate broker, to represent a buyer or seller in a real estate transaction which is *contingent* upon county approval such as the issuance of building or use permits. 64 Ops.Atty.Gen. 796 (1981). The facts in the instant case are somewhat analogous, but instead of petitioner being a broker to the developer, he was a potential seller. In both instances, the transactions were contingent upon the contracting party's obtaining a permit through the municipality. However, the profit earned by the broker/official as fees from that sales transaction was not held illegal, yet the profit earned by the official resulting from the contract for sale between the developer and the official was deemed illegal, with the imposition of harsh penalties.

This grave inconsistency in what kinds of profits are deemed acceptable highlights petitioners' contention that the state of law regarding what is actually prohibited "indirect" interest is at best ambiguous. This ambiguity has entrapped petitioner subjecting him to unduly harsh penalties. Because the penalty is so severe, petitioner contends that the absence of any scienter requirement violates the due process clause of the Fourteenth Amendment of the Federal Constitution. *See, The Void-For-Vagueness Doctrine In The Supreme Court* (1960) 109 Univ.Pa.L.Rev. 67, 87. *See also Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc.* (1982) 455 U.S. 489. The determination of whether a statute will survive a vagueness attack should include a careful look at the penalties which may be imposed. *Wilson* v. *Chancellor* (1976) 418 F.Supp. 1358, 1365.

Petitioner contends that the California Court's decision is repugnant to due process concerns and that California's vague conflict of interest statutes cannot pass constitutional muster.

The importance of this erroneous decision cannot be overlooked; it has far-reaching consequences in this state. Thus petitioners respectfully request that this Supreme Court grant certiorari to review the California decision in this matter.

III. THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE CASTS A CHILLING EFFECT ON ALL PUBLIC INTERESTS AND ASSETS WITHIN THE COMMUNITY THEY SERVE.

It is well established that conflict of interest legislation involves two competing public policies: the need to attract competent individuals to public positions weighted against the need to deter conflicts of interests. The Cal-

ifornia Supreme Court's decision in this case has set a dangerous precedent for the thousands of public officials in this state; the result of this case is not confined to petitioners alone.

The California decision as it stands will have a most chilling effect on all public officials in California who own property of any kind, who have pecuniary interests of any kind. With the growing ambiguity of the law governing conflict of interest, officials increasingly risk the possibility of disgrace, criminal penalties, even possible bankruptcy should they choose to rely on their own municipality's legal advisor, whose advice may later be found in error.

California courts have long recognized the two-step transaction fact situations whereby an official may be involved in the performance of a contract if no conflict exists at the time of the initial contract between the municipality and the contracting party. Such transactions have long been upheld so long as no prior arrangement or relationship can be established. *Escondido Lumber* v. *Baldwin, supra,* ruling to this effect, has never been overruled.

Other jursidictions faced with similar kinds of fact situations have reached a similar result. So long as there existed no interest in the contract at the time of its making, the courts have uniformly held that no violations had occurred. *See O'Neill* v. *Town of Auburn* (Supreme Court of Washington, 1913) 135 P.1000; *Ex Parte Howell* (Idaho, 1915) 150 P.19; *People* v. *Southern Surety Co.* (Michigan, 1917) 165 N.W. 769; *Commonwealth* v. *Withers* (1936) 266 Ky 29; *Kerr* v. *State* (Indiana, 1917) 116 N.E. 590.

The California Supreme Court's abrupt departure from this line of reasoning with its interjection of new and

frightening rules may now allow a seemingly innocent and violation-free set of facts to be twisted into being deemed illegal conduct resulting in tremendous penalties. This decision will create a nightmarish dilemma for officials who own significant property and interests in their community.

The Court's decision left alone will have the nefarious effect of encouraging public officials to seek private legal counsel at each step of any significant government function which may remotely affect the official. The very wealthy would not be too terribly inconvenienced as they could well afford such additional counsel. The very poor would be judgment proof. However the majority of officials who are undoubtedly in similar positions to petitioners may be crippled with a nagging fear that they may somehow be caught in a web of illegality. They may be discouraged from taking certain actions which may be quite permissible for fear that their actions may be misconstrued by a hostile taxpayer. They will no longer have the freedom to steer between lawful and unlawful conduct.

It is paramount that California's officials be not left with such tremendous uncertainty as to what interests are prohibited under the vaguely enacted section 1090. The decision below, left undisturbed, would greatly discourage many competent, well-intentioned individuals from serving in an official capacity. This California cannot afford. It is for these reasons that petitioners strongly urge this Court to exercise its supervisory powers and grant certiorari.

IV. THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE PERMITS A CIVIC PARK TO BE BURDENED WITH A CHRISTIAN CROSS, IN VIOLATION OF THE ESTABLISHMENT CLAUSES OF THE U.S. CONSTITUTION AND THE CALIFORNIA CONSTITUTION.

During the October 1984 term of the United States Supreme Court, the Establishment Clause was the subject of three cases. Clear support for separation of church and state was strongly proclaimed.

In *Wallace* v. *Jaffree* (1985) 44 CCH S.Ct. Bull.pB3251, et seq., United States Supreme Court Justice O'Connor quoted from *Lemon* v. *Kurtzman* (1971) 403 U.S. 602 to outlaw the school prayer statute. Her discussion at B3284 and 3285 highlights concern that this single purpose park in which the inescapable central feature is the Lions Club's monumental cross:

> sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. (quoting *Lemon.*)

Justice O'Connor's opinion in *Wallace* expresses a duty upon the judiciary to "examine whether government's purpose is to endorse religion and whether the [acceptance of the mini-park dedicated to this cross] actually conveys a message of endorsement." (B3285)

Before the end of June, the United States Supreme Court decided *Estate of Thornton* v. *Caldor, Inc.* (1985) ___ U.S. ___, in which it invalidated legislation which allowed a Sabbath holiday from work. At the close of the term on July 1, 1985, *Aguilar* v. *Fenton* and *School District of Grand Rapids* v. *Ball* (1985) ___ U.S. ___ invalidated federal legislation to finance education for under-

privileged parochial school children to the extent that federal funds are used to pay public school teachers to teach classes held in the parochial schools. It must be noted that although the Reagan administration has adopted a position in support of the school aid and school prayer cases, and has promoted other church/state establishment conflicts, the United States Supreme Court has been steadfast in its refusal to support establishment. Justice O'Connor continued at B3285:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' *Engle* v. *Vitale*, 370 U.S., at 431.

The California Supreme Court addressed the issue of the Establishment Clause in *Fox* v. *City of Los Angeles* (1978) 22 Cal.3d 792. The court forbade the expenditure of a few pennies a day to light up the Los Angeles City Hall tower with single and double bar crosses to celebrate Christmas and Easter according to the conflicting calendars of various Christian sects. In interpreting Section 5 of Article XIV of the California Constitution, the Court stated:

> This section has been said to constitute 'the definitive statement of the principle of government impartiality in the field of religion.' (37 Ops.Cal.Atty.Gen. 105, 107 (1961)) An examination of the debates of the constitutional convention which drafted the Con-

> stition of 1879 indicates that the provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes. (*Gordon* v. *Board of Education* (1947) *supra*, 78 Cal.App.2d 464, 472-473, 178 P.2d 448.) Under this section, the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has the direct, immediate, and substantial effect of advancing religion. Thus in *Frohliger* v. *Richardson* (1923) 63 Cal.App. 209, 217, 218 P. 497, the court struck down a statute appropriating money for the restoration of the San Diego Mission although it conceded that secular, i.e., historical and cultural—as well as religious ends were served by the enactment. (See also *County of Los Angeles* v. *Hollinger* (1963) 221 Cal.App.2d 154, 34 Cal.Rptr. 387 (religious Christmas parade); 37 Ops.Cal.Attn.Gen. 105 (1961) (religious public play); *Calif. Educational Facilities Authority* v. *Priest* (1974) 123 C.3d 593, 605, 116 Cal.Rptr. 361, 368.

That opinion continues at page 605 to state that establishment clause "bans any official involvement, whatever its form, which has the direct, immediate and substantial effect of promoting religious purposes."

In this present case, the California Supreme Court has clearly permitted a religious park to be created by the transfer to a governmental entity of a Christian shrine protected by an easement to a service club. A graphic description of the cross is found in the Court's opinion:

> This large monumental cross—a steel structure 15 to 20 feet high and firmly anchored in a permanent base—had been erected by the Lions Club in 1971 with the CALLS' permission. Visible from all areas

> of the city, it was (and still is) illuminated at night during the Christmas and Easter seasons. (Opinion, pages 10 and 11, correction added.)

The trial court concluded at C.T. 116-117 (in the total absence of testimony or other evidence) that:

> 13. The primary effect of the acceptance of the CALL parcel by he City—the addition of 1.1 acres of land to the City's park system—neither advanced nor inhibited religion; rather, the primary effect was to provide additional park land to the City and had negligible, if any, effect on any religious freedom.
>
> 14. The acceptance of the CALL Parcel by the City did not constitute excessive governmental entanglement with religion.
>
> 15. The acceptance by the City of real property encumbered by an easement for ingress and egress for the maintenance of a cross did not constitute action in violation of the First Amendment to the United States Constitution or by law, statutory or decisional.

The Court did not require rescission or declare that the transaction was void for violation of the California Constitution. This little constitutional infirmity was considered excusable with a money damages "indulgence" suggested by the diminished quality of the developer's performance. The Court evidently was not aware that religious services *continue* to the present, and the old mission analogy evidently was applied. While it is true that the cross has been displayed on Albany Hill for much of this century, its historic implication is not supported by the civilizing activities advanced through the California missions at the beginning of this state's colonial history. The opinion does not explain the justification for perpetuating this shrine, and its only discussion of the cross and the easement concerns the reduction of value of the park in money

terms. *The opinion totally omits consideration of the impact of the developer's breach of contract in constitutional terms and vis-a-vis the harsh remedy imposed on Mr. CALL.*

The Albany Hill cross dominates "overlook park" and cannot be ignored by those who use the 7½ acre area.

Fox goes to the heart of "establishment" at page 797:

> The California Constitution also guarantees that religion shall be freely exercised and enjoyed 'without discrimination or preference.' Preference is forbidden even when there is no discrimination.

In the instant case, the California Court ruled that the city could acquire an operating religious park "maintained" by a local service club, but that the constitutional problems presented by the cross and the easement may safely be left to a later damage suit for poor performance by IGC (dissent page 3). The establishment constitutional problems constitute the very factors rendering the park "unsuitable" for use as a public park, in absolute derogation of the contract between IGC and the City. Such failure of performance of the IGC-City contract is the very basis of the instant action by petitioners, for instead of a park suitable for all members of the public without regard to religion, the City of Albany has gotten land burdened with a cross.

A later damage suit, suggested by the Court based on the same absence of performance by IGC, is, in essence, tantamount to a splitting of actions and invites waste of judicial resources. Full relief, including rescission of the IGC-City contract, should have been granted for the same underlying failure of performance.

Petitioners contend that the initial attempt to convey their land to the city was *void* because the "Establish-

ment" clauses of both the federal and California Constitutions prohibit receipt by a public entity of land which had been made into a Christian shrine by the erection of a 21 foot illuminated cross. Because the California Supreme Court, by its decision has effectively permitted this violation to continue, petitioners respectfully request this Supreme Court to grant certiorari and review this important matter.

CONCLUSION

For all of the reasons stated above, petitioners HUBERT and RUTH CALL respectfully request this Court to grant their petition for certiorari to the California Supreme Court.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S.F. 24693
Super. Ct. 448248-8

BRUCE THOMSON *et al.*,
Plaintiffs and Appellants,

v.

HUBERT CALL *et al.*,
Defendants and Appellants;

CITY OF ALBANY *et al.*,
Defendants and Respondents.

FILED IN THE COURT
May 23 1985
Laurence P. Gill, Clerk

(SEE CONCURRING AND DISSENTING OPINION)

The truism that a person cannot serve two masters simultaneously finds expression in California's statutory doctrine that no public official shall be financially interested in any contract made by that person or by any body or board of which he or she is a member.[1] Plaintiffs in this taxpayers' suit challenge the validity of a transaction in which defendant Cebert Properties, Inc., purchased a parcel of land from defendants Hubert F. Call (Call) and Ruth L. Call, his wife, for $258,000

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[1] Of greatest statewide application are Government Code sections 1090, 1091, 1092, and 1097, and Education Code sections 35233, 35240, and 72539. Other provisions designed to meet particular conflict-of-interest problems are scattered throughout the other codes. (See, e.g., Health & Saf. Code, §§ 50904, 50905; Pen. Code, §§ 99, 100; Pub. Util. Code, §§ 12722, 12392; Bus. & Prof. Code, § 19423.)

and then conveyed the parcel to the City of Albany (city)—while Call was a member of the Albany City Council.

The defendants named in the complaint included the city, the Calls, various council members who served with Call, Cebert Properties, Inc., and three other corporations. After a nonjury trial, the court found (1) Call's financial interest in the transaction violated Government Code section 1090;[2] (2) the Calls were liable to the city for the $258,000 they received from the sale, plus interest; (3) the city was nevertheless to retain title to the land; and (4) relief was to be denied as to the other defendants. Judgment was entered accordingly.

The Calls appeal from the judgment insofar as it holds them liable to the city for the $258,000 plus interest. Plaintiffs appeal from it insofar as it denies relief as to the corporate defendants.[3] These appeals present the question of what remedies are available once a section 1090 violation is found and the fully performed underlying contract is adjudged void.

Facts

The summit of Albany Hill commands a panoramic view of Albany and San Francisco Bay. In and before 1972, IGC owned 36 acres of land at the westerly base and on the adjacent slope

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[2] In pertinent part, section 1090 states that "[C]ity officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Unless otherwise noted, all section references are to the Government Code.

[3] The named defendants were Interstate General Corporation (IGC); Interstate General Development, Inc. (IGD); Interstate Albany Corp. (IAC); and Cebert Properties, Inc. (Cebert). At all times relevant to the challenged transaction, IAC was a subsidiary of IGD, IGD was a subsidiary of IGC, the stock of Cebert was owned by James J. Wilson, and James J. Wilson was both the president of IGC, IGD, and IAC and a director of all four corporations. For purposes of this litigation, the four corporations are essentially interchangeable.

of the hill. That slope and the summit were undeveloped in 1972. The land at the summit consisted of four contiguous parcels: a 1.1-acre parcel owned by the Calls; a 2-acre parcel which was the uppermost part of the 36 acres owned by IGC; a 2.2-acre parcel owned by a partnership (Albany Hill Associates); and a 2-acre parcel owned by Golden Gate Hill Development Co.

In 1972, all of these lands were within a hill control (HC) district estabilshed by the city's zoning ordinance. IGC's 36 acres were zoned R1HC (for single family dwellings) and the Calls' parcel was zoned R3HC (for high-rise, high-density residential units). Under a city ordinance, no building permit for the erection of any structure on HC district land could be issued unless a use permit had first been obtained from the city council.

Planning to construct a 2,500-unit high-rise residential complex on its 36-acre parcel, IGC applied to the city council for a use permit in July 1972. This application included a request that the parcel be rezoned from R1HC to R3HC. IGC's project proposal met with general approval at subsequent public meetings. Members of the council repeatedly stated that any pending use permit should be subject to a condition requiring IGC to dedicate land on Albany Hill for use as parks and permanent open space.

In August 1972, the city council considered a parks and recreation commission proposal that a site for a municipal park be acquired at the summit of Albany Hill.[4] The council voted to "go on record as generally concurring" with the park proposal. Councilman Call, though present at the meeting, did not participate in the discussion of the proposal and he abstained from the vote.

A series of offers, counteroffers, and negotiations between IGC and the city began in October 1972, when the city attorney

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[4] This site later became known as Overlook Park.

and the city's administrative officer proposed certain conditions to be included in the use permit. These included a requirement that IGC dedicate its two-acre summit parcel and a creekside parcel at the base of the hill to the city.

IGC rejected this condition on November 3, 1972, and proposed its so-called "$600,000 plan." This plan required IGC to "allocate" $600,000 of its own money for the acquisition of land for Overlook Park; to spend that sum, or less, for the acquisition of such land by IGC through "private negotiation"; to convey any land so acquired to the city, for use as part of the park; and to pay to the city any unexpended balance of the $600,000 for use in "condemning by eminent domain" any land required for the park but not acquired from IGC pursuant to the $600,000 plan.[5]

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[5] Referring to "our application to develop our property in Albany," IGC's letter of November 3 continued: "Should our application be granted, we agree to allocate $600,000 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgment, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City . . . [as] . . . Overlook Park. [¶] While this property is not subject to any public use by the City and has not been heretofore the subject of any litigation in eminent domain for acquisition by the City, the developer is agreeable to providing the City, not as a consideration or a condition of the zoning application, but in the general overall public interest, with no countervailing advantage to the developer, concurrent with the issuance of the first construction permit, by deed to the City, as a gift, such of the real property as it has been able to acquire for the $600,000 that the City is agreeable to using as a gift for the sole purpose of being a permanent park and open space for the City. . . . [¶] The land, together with the acreage that we will be dedicating . . . will provide the City . . . with a unique, superb and useful view park for the public enjoyment and open space. If, in our negotiations, we are unsuccessful in concluding purchase arrangements with the private landowners who own real property within the area of the proposed park, we reserve the right to pay over to the City . . . all unexpended funds, as a gift and not as a consideration of any

On November 10, 1972, the city offered an alternative proposal, at the same time asking IGC to "reiterate" the $600,000 plan outlined in its letter of November 3. In a letter dated November 12, 1972, IGC reiterated the $600,000 plan, offering to expend the $600,000 in acquiring additional property for the proposed Overlook Park, all at or above the 200-foot contour of the hill, and to donate its own 2-acre parcel at the summit. The only land at or above the 200-foot contour not already owned by IGC consisted of the contiguous parcels owned by the Calls, Albany Hill Associates, and Golden Gate Hill Development Co.

The city council acted on IGC's application at a meeting on November 13, 1972. In the first of three successive votes, the council amended Albany's zoning ordinance to rezone IGC's thirty-six acres from R1HC to R3HC. Next, it voted to grant the use permit to IGC on specified conditions which included conveyance of IGC's two-acre parcel to the city "for the sole purpose of being a permanent park and open space for the City."[6] The $600,000 plan—not listed as a condition of the use permit—was reached in the council's third action, when a majority voted to accept IGC's "offer" to allocate $600,000 "for the purpose of purchase of additional private property to encompass the proposed Overlook Park. . . ." Call was present at this meeting. He voted to rezone IGC's property and to grant the use permit. He abstained from the vote that the city "accept the offer" of IGC relative to the $600,000 plan.

It should be noted that on several occasions Call asked the city attorney whether or not the could speak on certain issues

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zoning application, from the $600,000 so that the City may use these funds solely for condemning by eminent domain all of the lands that the City requires [for Overlook Park]."

[6] Whether conveyance of the two-acre parcel was part of IGC's original offer is unclear. IGC's letter of November 3 referred to "the acreage that we will be dedicating" which—presumably—included the two-acre parcel at the summit. However, the two-acre summit parcel was not specifically designated until IGC "reiterated" its original offer.

or vote on certain issues pending before the council, and on such occasions he was advised not to speak or vote if real property in which he had a financial interest was involved in the pending issues. Call generally followed such advice when it was sought and given. In this instance, he was told by the city attorney that he could discuss and vote on IGC's applications for rezoning and for the use permit.

Shortly thereafter, the city's administrative officer made it clear to IGC that the first building permit would not be issued until land had been acquired under the $600,000 plan. IGC then obtained appraisals of the three summit parcels owned by the Calls, Albany Hill Associates, and Golden Gate Hill Development Co. Using the results of these appraisals, it extended offers to the respective owners. None was accepted.

IGC's appraiser appraised the Calls' 1.1-acre parcel at $63,800. Responding to the $63,800 offer for his property, Call wrote to IGC, describing recent sales of "comparable zoned properties" in Albany. He stated: "While we have no interest in selling at this time, we would be agreeable to having the property go into a park for the City of Albany. From the comparables listed above, our property is clearly worth $360,000. . . . In view of the above mentioned, your offer is unacceptable. I would be willing to meet and negotiate."

IGC then authorized real estate broker Jack Krystal to negotiate with the property owners to arrange purchases in satisfaction of the $600,000 plan. Krystal's commissions were to be paid by the sellers.

After rejecting Krystal's first offer of $180,000, Call agreed to sell to IGC for $258,000.[7] At all times during the negotiations with Krystal, Call knew that IGC was acquiring the parcel for conveyance to the city pursuant to the $600,000 plan.

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[7] Krystal also obtained Albany Hill Associates' summit parcel at a price considerably higher than the original offer. Together, the two purchases exhausted all but $2,000 of the $600,000.

In June 1973, Krystal presented a written contract to the Calls, wherein IGC offered to buy their 1.1-acre parcel for $258,000. The offer was for title to the parcel "free of liens, encumbrances, easements . . . and conditions of record . . . other than exceptions of record" shown in an attached preliminary title report. IGC expressly conditioned the contract upon its "being issued all necessary permits to a project located adjacent to this property.[8]

The written escrow instructions provide a clear overview of the transactions. IAC delivered buyer's instructions with which it deposited in escrow an application for the first-phase building permit; the sum of $600,000; and an additional $68,000 to cover fees and charges payable to the city upon issuance of the building permit. IAC instructed the escrow holder to pay "any remaining balance" of the $600,000 to the city, and to pay the $68,000 to the city, upon receipt in escrow of a building permit issued by the city.

The city's escrow instructions directed the escrow holder to transmit the buidling permit to IAC when the holder was able to transmit to the city the required fees ($68,000), the unexpended balance of the $600,000 plan ($2,000), and the grant deeds for the summit parcels.

The Calls deposited two grant deeds with instructions to deliver both deeds when the escrow holder held for their account the $258,000, minus certain itemized deductions. One of the deeds was a grant deed which conveyed the 1.1-acre parcel to Cebert, the entity IGC had designated as the actual buyer of the two parcels from the Calls and Albany Hill Associates. The other was a grant deed conveying to the Albany Lions Club "an easement" on the parcel "for ingress and egress to maintain the existing cross standing" on the parcel. This large monumental cross—a steel structure 15 to 20 feet high and

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[8] This condition was also included in the contract between IGC and Albany Hill Associates, the partnership whose 2.2-acre parcel IGC acquired in partial satisfaction of the $600,000 plan.

firmly anchored in a permanent base—had been erected by the Lions Club in 1971 with the Calls' permission. Visible from all areas of the city, it was illuminated at night during the Christmas and Easter seasons.

Shortly before the close of escrow, Call had insisted upon burdening the parcel with the easement,[9] and although it was not an "exception of record" to its title, IGC offered no objection. The president of IGC testified that although he would not have been willing to pay as much for the Calls' parcel with the easement on it (because of the obvious diminution in the parcel's value), he was fairly indifferent to the creation of the easement on what was to be a public park. Without objection, therefore, the parcel was burdened with the easement before it was conveyed to Cebert (and by Cebert to the city).[10]

At a meeting conducted on August 21, 1973, the city council adopted a resolution by which it approved a tentative map of IGC's project. Call voted for this resolution. The council also adopted a resolution accepting the grant deed from Cebert, as well as a "ratifying" resolution in which it stated that it did "approve and ratify the purchases of the certain real properties . . . described in that Grant Deed [refered to in the previous resolution]." Acting on the advice of the city attorney, Call abstained from voting on these two resolutions. There is no evidence that the members of the council, other than Call, knew that the Calls' 1.1-acre parcel was being accepted by the city subject to the easement for maintenance of the cross.

When escrow closed on August 24, 1973, the Lions Club had the cross and its easement for the maintenance of the cross.

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[9] Call testified that he told Krystal he would sign the sales contract "on one condition . . . that the cross will remain there permanently and an easement over the property to the cross is granted."

[10] Cebert deposited into escrow a grant deed conveying title to both parcels to the city. The deed did not show that title to the Calls' parcel was to be conveyed subject to an easement held in connection with the cross.

IGC had its building permit and began large-scale construction of its project shortly thereafter. The city had acquired land for Overlook Park, including the Calls' parcel, subject to the easement held by the Lions Club. And, of course, the Calls had their $258,000, less certain itemized deductions such as the broker's commission.

Evidence received as to the fair market value of the Calls' 1.1-acre parcel in 1973 was detailed and conflicting. IGC's appraiser fixed it at $63,800 as of February 18, 1973. Plaintiffs' appraiser testified that the value of the parcel was $100,000 in March of 1973. By contrast, an appraiser who testified for the Calls' fixed its value in August 1973 at $450,000. All three appraisals are premised upon the assumption that the highest and best use of the 1.1-acre parcel was for the high-density residential construction which its R3HC zoning permitted. The $63,800 figure was based upon the estimate that the parcel would accommodate 22 units evaluated at $2,900 per unit for appraisal purposes.[11] Plaintiffs' figure of $100,000 was based on an estimate of 35 units evaluated at approximately $3,000 per unit. The Calls' figure was based on 90 units at $5,000 per unit.

Although the Calls had acquired the parcel in 1970 at a price much lower than any of the appraisers' figures, there was evidence that the pendency and size of IGC's project had substantially increased the market value of the parcel and nearby proerty in 1972 and 1973. On the other hand, testimony by several witnesses supported an inference that the value of the parcel had been severely diminished by the location of the cross and by the easement granted to the Lions Club. Obviously, the cross and easement would prevent or limit construction of the high-density residential units allowed by the parcel's zoning and presupposed by the appraisers' "highest and best use" calculations.

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[11] The president of IGC disagreed with his appraiser's assumption that only 22 units could be constructed on the parcel; he estimated that it would accommodate 90 units at $3,000 per unit.

DECISION OF THE TRIAL COURT

The trial court filed a memorandum of decision reviewing the evidence in detail and stating the following conclusions: the complex transaction had produced a "single contract" in which Call had a financial interest in violation of section 1090; the appropriate remedy consists of retention by the city of the parcel of land sold by the Calls and a "forfeiture" of the $258,000 (plus interest) by the Calls to the city; the other defendants are not liable to the city in any respect.[12] With regard to IGC, the court found that IGC had not made itself a trustee or agent in agreeing to devote $600,000 to acquisition of property to be deeded to the city and that even if it had become a "trustee," it faithfully fulfilled the "specific directives in the trust agreement."

Following its memorandum of decision, the trial court signed and filed elaborate findings of fact and conclusions of law and entered a judgment ordering that plaintiffs "take nothing by their complaint" from the corporate defendants and that they recover the $258,000 with interest from the Calls. The court found that no defendant had perpetrated a fraud, actual or constructive, on the city and that no defendant had conspired to defraud the city or to violate section 1090. Addressing the potential establishment clause problem raised by the city's acquisition of property burdened with a cross, the court found that the acquisition had a secular purpose and effect (use by the public as a park), that acceptance of the land neither advanced

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[12] During the trial, plaintiffs had dismissed the action with prejudice as to defendant Jack Krystal. At the close of plaintiff's case, Call's fellow councilmen moved for judgment under Code of Civil Procedure secion 631.8. That motion was granted.

Although the court found that IGC was not liable to the city, it did note that IGC had apparently breached its agreement by conveying the Calls' parcel encumbered with the easement in favor of the Lions Club. However, it did not render judgment against IGC, observing that there was "no cause of action in Plaintiffs' complaint embracing such a breach."

nor inhibited religion, and that it did not constitute excessive governmental entanglement with religion or violation of the First Amendment.

DISCUSSION

I

However complex the transaction, IGC's purchase of property from the Calls and Albany Hill Associates, and its conveyance of that property to the city, were in performance of a single multi-party agreement. The scope of this agreement and the interdependency of the many subordinate transactions are best revealed in the escrow instructions themselves.[13] IGC's letters proposing the $600,000 plan, the relevant resolutions adopted by the city council, the acceptance of the deeds and ratification of the purchases made by IGC, the use and building permits, and the real estate purchase contracts concerning the Call parcel and the Albany Hill Associates parcel further reflect the terms and conditions of the agreement.

The Calls contend that the purchase of their parcel was not a term or condition of the contract between IGC and the city, but was, rather, later negotiated in the performance of the contract by IGC. However, the prospect that performance of the contract would involve acquisition of the Calls' land and conveyance of that land to the city was contemplated by all parties. The land was one of only three parcels at the summit of Albany Hill which were expressly targeted in the contract for acquisition by IGC and conveyance to the city. Purchase of the Calls' parcel was clearly part of a previous arrangement; the fact that the real estate purchase contract between the Calls and IGC was entered into after the city's acceptance of the $600,000 plan in no way alters the fact that the transactions between the Calls, IGC, and the city were part of a single agreement.

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[13] See page ____, *ante*.*

* See typed opinion page 9, *ante*.

Moreover, the policy goals of section 1090 support the rule that public officers "are denied the right to make contracts in their official capacity with themselves *or to become interested in contracts thus made.*" (Stockton Plumbing & Supply Co. v. Wheeler (1924) 68 Cal.App. 592, 602.) (Italics added.) We have recognized an exception to this rule where the conflict arose after the award of the contract, but this exception turns upon the fact that no earlier agreement—express or implied—existed between the official and the entity contracting directly with the city. (City of Oakland v. California Const. Co. (1940) 15 Cal.2d 573, 577 [councilman accepted employment with defendant construction company *after* council awarded contract to defendant and had no interest in the contract at the time it was awarded]; Escondido Lumber, etc. v. Baldwin (1906) 2 Cal.App 606, 608 [contractor who received construction contract from school district purchased—without previous arrangement or agreement—materials from corporation in which a school district trustee was a stockholder and officer]; see, also, People v. Deysher (1934) 2 Cal.2d 141, 146.)

Section 1090 forbids city officers such as Call from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." The proscribed interest certainly includes any *direct* interest, such as that involved when an officer enters directly into a contract with the body of which he is a member. (Osburn v. Stone (1915) 170 Cal. 480; Berka v. Woodward (1899) 125 Cal. 119; Co. of Shasta v. Moody (1928) 90 Cal.App. 519.) California courts have also consistently voided such contracts where the public officer was found to have an *indirect* interest therein. In Moody v. Shuffleton (1928) 203 Cal. 100, for example, a county supervisor sold his printing business to his son and took a promissory note secured by a chattel mortgage on the business. Because the business helped to secure the value of the official's mortgage, we held that a conflict existed when printing contracts were awarded to the son. It is also clear that where the public officer is a stockholder in a corporation mak-

ing such a contract, the contract will be adjudged void under the conflict of interest statutes.[14]

As part of the transaction at issue, Call sold property to the city, using IGC as a conduit. Whether we regard his interest as direct or indirect, it is clearly a pecuniary interest forbidden by section 1090 and by the decisions applying conflict-of-interest rules generally. Neither the absence of actual fraud nor the possibility of a "good faith" mistake on Call's part can affect the conclusion that this contract violates section 1090 and is therefore void.[15] (Stigall v. City of Taft (1962) 58 Cal.2d 565, 568-569; San Diego v. S.D. & L.A. R.R. Co. (1872) 44 Cal. 106, 113; City of Imperial Beach v. Bailey (1980) 103 Cal.App.3d 191, 197; Fraser-Yamor Agency, Inc. v. Co. of Del Norte (1977) 68 Cal.App.3d 201, 215; Schaeffer v. Berinstein (1956) 140 Cal.App.2d 278, 290; Hobbs, Wall & Co. v. Moran (1930) 109 Cal.App. 316, 319.)[16]

II

Having established Call's violation of section 1090, we turn to the primary issue presented by this case: what is the appropriate remedy where a fully executed and performed contract has been found to violate section 1090?[17]

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[14] See Finch v. Riverside & A. Ry. (1891) 87 Cal. 597 (city trustee votes to approve street car franchise, said trustee being at the same time a subscriber to stock in the street car company); Miller v. City of Martinez (1938) 28 Cal.App.2d 364 (shareholder and employee of oil company was also a public officer).

[15] California courts have generally held that a contract in which a public officer is interested is *void*, not merely voidable. (People v. Deysher (1934) 2 Cal.2d 141, 146; *Berka, supra*, at p. 27; *Stockton Plumbing, supra*, at p. 601.)

[16] See, also, Kennedy & Beck, *Interest of Public Officers in Contracts Prohibited by Law* (1955) 28 So.Cal.L.Rev. 335, 340; Kaufmann & Widiss, *The California Conflict of Interest Laws* (1963) 36 So.Cal.L.Rev. 186, 196.

[17] Injunctive relief will lie if the contract has not been performed.

The trial court's solution—allowing the city to retain the land and, at the same time, recover the $258,000 plus interest from the Calls[18]—finds ample support in California case law. Clearly, no recovery could be had or goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar conflict-of-interest statutes. (Moody v. Shuffleton, *supra*, 203 Cal. 100; Berka v. Woodward, *supra*, 125 Cal. at pp. 121, 123-124; Domingos v. Supervisors of Sacramento (1877) 51 Cal. 608; Salada Beach etc. Dist. v. Anderson (1942) 50 Cal.App.2d 306, 310; Miller v. City of Martinez, *supra*, 28 Cal.App.2d at pp. 370-371; Hobbs, Wall & Co. v. Moran, *supra*, 109 Cal.App. at p. 320; Co. of Shasta v. Moody, *supra*, 90 Cal.App. at pp. 523-525.)

Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract. *Berka, supra*, at pp. 123-124; *Miller, supra*, at p. 370; *Co. of Shasta, supra*, at pp. 523-524.) Confronting this issue directly, the court in *Co. of Shasta* rejected the appellant's contention that the county was estopped from maintaining an action against him without first restoring or offering to restore to him the benefits it received from him under the contract. The court reasoned that because the contracts were void under the statute[19] and against public policy, "there is no ground for any equitable considerations, presumptions, or estoppels. . . . The contracts in the case at

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(See Moody v. Shuffleton, *supra*, 203 Cal. at p. 100, 105; Berka v. Woodward, *supra*, 125 Cal. at pp. 121, 129; Hobbs, Wall & Co. v. Moran, *supra*, 109 Cal.App. at pp. 317, 321.)

[18] This solution assumes that the $258,000 paid to the Calls by IGC ultimately represented a sum expended by the city itself. This seems entirely reasonable. Regardless of the Calls' Involvement, the $600,000 plan committed IGC to transferring $600,000 to the city, either in cash or in acquired property.

[19] Section 4322 of the Political Code, since repealed. All conflict-of-interest cases cited in this opinion involve section 1090 or statutes which are analogous or similar.

bar, as we have seen, *are against the express prohibition of the law and courts will not entertain any rights growing out of such a contract, or permit a recovery upon a quantum meruit or quantum valebat.*" (*Co. of Shasta, supra,* at pp. 523-524, citing *Berka, supra.* See, also, Salada Beach etc. Dist. v. Anderson, *supra,* 50 Cal.App.2d 306.[20])

The trial court's remedy is thus consistent with a long, clearly established line of cases. Admittedly, the resulting forfeiture seems harsh under the facts of this case. Call was found not to have committed fraud, actual or constructive, or to have conspired to violate section 1090. Indeed, he did seek and obtain advice from the city attorney on certain occasions, and he did follow the specific advice he received. No evidence in the record supports an inference that Call actually initiated the entire transaction, and there is conflicting evidence as to the difference between the fair market value of the parcel and the amount IGC actually paid for it pursuant to the $600,000 plan.

However, examination of the goals and policy concerns underlying section 1090 convinces us of the logic and reasonableness of the trial court's solution. In San Diego v. S.D. & L.A. R.R. Co. (1872) 44 Cal. 106, we recognized the conflict-of-interest statutes' origins in the general principle that "no man can faithfully serve two masters whose interests are or may be in conflict": "The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. . . . For even if the honesty of the agency is unquestioned . . . yet the principal has in fact bargained for the exercise of all

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[20] In *Salada Beach,* a director of a public utility district purchased bonds issued by the district. This transaction violated the applicable conflict-of-interest statute, which provided that a director shall not be interested in any contract awarded by the board of directors, and was therefore void. The former director contended that the district could not retain the benefits received from the transaction. Relying upon *Co. of Shasta* and upon the policy considerations underlying the statute, the court held that the district was not obligated to pay the former director the value of the bonds. (50 Cal.App.2d at p. 310.)

the skill, ability and industry of the agent, and he is entitled to demand the exertion of all this in his own favor." (44 Cal. at p. 113.) We reiterated this rationale more recently in Stigall v. City of Taft (1962) 58 Cal.2d 565: "The instant statutes [§ 1090 et seq.] are concerned with *any* interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city." (58 Cal.2d at p. 569. See, also, City of Imperial Beach v. Bailey (1980) 103 Cal.App.3d 191, 196; City Council v. McKinley (1978) 80 Cal.App.3d 204, 212; People v. Darby (1952) 114 Cal.App.2d 412, 426; *Miller, supra*, 28 Cal.App.2d at p. 366; Hobbs, Wall & Co., *supra*, 109 Cal.App. at p. 319.)

In *Stigall* we relied in part on the reasoning of the United States Supreme Court on a federal penal statute under which a contract was declared to be unenforceable because of a conflict of interest: "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." *Stigall, supra*, 58 Cal.2d at p. 570, *quoting* United States v. Mississippi Valley Generating Co. (1961) 364 U.S. 520.) Implicit in this reasoning is the assumption that the purpose of such statutes is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." *(City of Imperial Beach, supra*, 103 Cal.App.3d at p. 197 [construing § 109].)

It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the vio-

lation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved.[21] Nor is an actual *loss* to the city or public agency necessary for a section 1090 violation. In *Stigall*, for example, a city councilman had a financial interest in a plumbing company which submitted the *lowest* bids for a municipal contract. Taxpayers sued to have the contracts declared void. They did not allege "actual improprieties," nor did they contend that the contract was unfair, unjust, or not beneficial to the city. (58 Cal.2d at p. 568.) On these facts, we nonetheless concluded that the contract violated section 1090, reasoning that the "object of these enactments is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud of dishonest conduct." (*Id.* at p. 569. See also, San Diego v. S.D. & L.A. R.R. Co., *supra*, 44 Cal. at p. 13; *City of Imperial Beach*, *supra*, 103 Cal.App.3d at p.197; *Fraser-Yamor Agency, Inc.*, *supra*, 68 Cal.App.3d at p. 215; Schaeffer v. Berinstein (1956) 140 Cal.App.2d 278, 290.)[22] And in *Shuffleton*, *supra*, we observed that "it matters not how fair upon the face of it the contract may be, the law will not suffer [the official] to occupy a position so equivocal and so fraught with temptation." (23 Cal. at p. 105.)

In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public

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[21] See *Kennedy & Beck*, *supra*, at page 340; *Kaufmann*, *supra*, at page 196.

[22] "[N]or is it necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. The purpose . . . is to remove all indirect interest of an interested officer as well as to discourage deliberate dishonesty. [Citations.] It is not the character of the contract itself, but the manner in which it is created, that renders it violative of sound public policy." (Berinstein, *supra*, 140 Cal.App.2d at p. 290.)

entity than others might be have any bearing upon the question of its validity. (Capron v. Hitchcock (1893) 98 Cal. 427.)

Moreover, California courts have consistently held that the public officer cannot escape liabiity for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations.[23] *(Stigall, supra,* 58 Cal.2d at pp. 570-571; *Hobbs, Wall & Co., supra,* 109 Cal.App. at p. 319.) Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council. *(Stigall, id.; Fraser-Yamor Agency, Inc., supra,* 68 Cal.App.3d at pp. 211, 215; *Hobbs, Wall & Co., supra,*109 Cal.App. at p. 319. See, also, *Kennedy & Beck, supra,* at pp. 340-341; *Kaufmann, supra,* at p. 196.) Similarly, the full disclosure of an interest by an officer is also immaterial,[24] as disclosure does not guarantee an absence of influence. To the contrary, it has been suggested that knowledge of a fellow officer's interest may lead other officers to favor an award which would benefit him.[25]

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[23] See, e.g., *City of Imperial Beach, supra,* where a councilwoman possessed an interest in a concession stand on a municipal pier. The question in the action by the city for declaratory relief was whether the city council could renew or extend a contract it had with the concession operators. Because the city council would have to approve any such renewal and the contract rates, the court held that it would be prohibited under section 1090, even if the councilwoman abstained from voting: "It is not her participation in the voting which constitutes the conflict of interest, but her potential to do so." (103 Cal.App.3d at p. 195.)

[24] See *Berka, supra,* 125 Cal. at page 129; *Stockton Plumbing & Supply Co., supra,* 68 Cal.App. at page 603.

[25] *Kaufmann, supra,* at page 196. We recognize the difficulty faced by a public officer who—for reasons beyond his control—finds himself in a potential conflict-of-interest situation. In addition to fully disclosing the interest, abstaining from relevant votes and discussions, seeking the advice of the city attorney, and refraining from taking advantage of the situation, it has been suggested that he could divest

The case law supports strict enforcement of conflict-of-interest statutes. Mitigating factors—such as Call's disclosure of his interest in the transaction, and the absence of fraud—cannot shield Call from liability.[26] Moreover, the trial court's remedy—allowing the city to keep the land and imposing a money judgment against the Calls—is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.

On the other hand, the forfeiture in this case is undeniably harsh in light of the absence of fraud and Call's partial reliance upon advice given by the city attorney. Also, beyond the effect

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himself of the interest (prior to official action), or, in some instances, actually resign from his office. (People v. Darby, *supra*, 114 Cal.App.2d at p. 426.) Resignation from office does not, however, appear to be a viable alternative; indeed, it may be counter to the public interest in retaining competent public officers. In the instant case, Call was under no compulsion to negotiate with or sell the parcel to IGC. He could have simply informed IGC that to sell his land to the city, using IGC as a conduit, would place him in a conflict-of-interest situation; he would thereby have avoided any interaction with IGC which might implicate him in the $600,000 plan. If, after IGC's performance of the $600,000 plan, the city still wished to acquire the Calls' parcel, it could have done so through eminent domain.

[26] We note, also, that this case does not confront us with a purely innocent or unknowing violation of the statute. Knowing that the city would be purchasing the property, Call negotiated for the $258,000 selling price which the evidence suggested may be well above fair market value. He did vote on some of the relevant matters, and his consultations with the city attorney and abstinence from certain votes appear to satisfy niceties of form rather than the substantial ethical demands of his public office. Moreover, Call insisted upon the easement, thereby considerably diminishing the value of the land which he knew was to be purchased by the city.

of the trial court's decision on the Calls, it has been suggested that such a harsh prohibition of financial interest may frustrate the strong public policy goal of attracting competent individuals to public service positions. This argument assumes—not unreasonably, perhaps—that some of the most qualified potential civic leaders are usually those engaged in business or in the professions, and that currently many such persons otherwise qualified and willing to serve are discouraged from serving because of the possibility of public disgrace, criminal penalties, and harsh forfeitures such as that imposed upon the Calls.[27] Furthermore, the public has an interest in securing the best possible contractual arrangement for goods or services, even if it is an arrangement involving a public official.

We have considered the possibility of an intermediate solution which—though less severe than that imposed by the trial court—would nonetheless discourage public officials from becoming involved in potential conflict-of-interest situations. One approach would allow the city to retain the park land while allowing the Calls to retain only the fair market value of the land *at the time of its conveyance to IGC*, plus interest. The city's outlay would thus be equivalent to what it would have paid the Calls in an eminent domain proceeding. Arguably, this remedy would be consistent with the trial court's finding that there was no fraud or conspiracy to violate section 1090.

Of course, such an approach would involve difficult valuation problems. As the facts in this case suggest, appraisers' calculations often vary dramatically. Should the Calls' parcel be appraised with or without the cross and easement? Obviously, the easement would reduce the fair market value of the property considerably, perhaps rendering it unsuitable for development at the best and highest uses allowed under R3HC zoning. Should the fair market value of the parcel reflect the changes in

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[27] See Note, *Conflict of Interest in Public Contracts in California* (1956) 44 Cal.L.Rev. 355; Note, *Temptation and Tradition in the California School Board* (1952) 5 Stan.L.Rev. 61.

value attributable to IGC's development? That development may, itself, be implicated in the section 1090 violation at issue in this case.

However difficult the valuation problems, courts are qualified and experienced in such matters. A more serious problem with this approach is that it really provides only a weak incentive for public officials to avoid such situations. If they enter into such arrangements and "get caught" in the section 1090 violation, this remedy would leave them as well off as they were prior to the transaction; if the violation goes unnoticed or unchallenged, they would profit from the deal. Certainly the deterrent effect of the trial court's solution is greater, effectively implementing the conflict-of-interest statutes' strict public policy goals.

This intermediate approach also assumes, in effect, that in situations such as this the targeted "wrong" is the loss to the city or the councilman's undue profit—i.e., the amount Call received in excess of a given fair market value. There is indeed substantial evidence that $258,000 was higher than the fair market value of the 1.1-acre parcel, especially in light of the easement for maintenance of the cross. However, our review of the case law construing and applying section 1090 and similar statutes indicates that the contract here would have violated section 1090 even if Call's return had *not* been greater than the fair market value. Section 1090 prohibits *any* financial interest, not merely an undue profit. *If the parcel had been sold at the lowest appraisal level ($63,800) or for a price actually lower than the fair market value, Call would nonetheless have violated section 1090.* The prophylactic function of the statute is to prevent conflicts of interest from occurring—not simply to recoup losses or force violators to disgorge profits.

Theoretically, a range off possibilities less harsh than the forfeiture imposed by the trial court could be devised. For example, the city could be allowed to retain the land and recover the $258,000, *minus the amount the Calls actually paid* for the land in 1970. This approach would circumvent

thorny valuation problems (the Calls' purchase price is an easily ascertainable sum), provide some incentive for officials to avoid conflict-of-interest situations, and still allow the Calls to recoup most of their out-of-pocket losses. However, like the fair market value approach outlined above, this out-of-pocket-loss solution also implies that undue profit and loss to the city are the primary concerns of section 1090, and that full disclosure and the absence of a finding of fraud are key considerations in determining liability under section 1090.

The facts of this case represent but one of endless permutations generated by the basic conflict-of-interest situation, and a different remedy could be tailored for each. The trial court's approach adheres to precedent established by a long line of California cases. It is consistent with the policy of strict enforcement of conflict-of-interest statutes, it provides a strong disincentive for those officers who might be tempted to take personal advantage of their public offices, and it is a bright-line remedy which may be appropriate in many different factual situations. As we have seen, *civil liability* under section 1090 is not affected by the presence or absence of fraud, by the official's good faith or disclosure of interest, or by his nonparticipation in voting; nor should these considerations determine the civil remedy.[28] For these reasons, and because of the significant public policy goals which mandate strict enforcement of conflict-of-interest statutes such as section 1090, we conclude that the remedy applied by the trial court was justified, supported by both California case law and public policy.

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[28] Where the official commits fraud or conspires to violate section 1090, he will, of course, also be subject to criminal sanctions under section 1097: "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales . . . is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state."

III

Plaintiffs, on their appeal, contend that the trial court erred in failing to hold the corporate defendants liable to the city. They argue, first, that the corporate defendants acted as the city's agents in the performance of the contract embodied in the $600,000 plan, and that they breached their duties as agents in conveying encumbered land to the city. Alternatively, it is argued that the corporate defendants breached their duties as trustees to the city. These theories are answered by the trial court's conclusion that "[w]ith respect to the $600,000 plan, and the satisfaction of its obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany." Substantial evidence supports the underlying finding that the $600,000 plan did not vest in the city any right or power to control the real property acquisitions of IGC in its performance of the plan. Nor did the city attempt to control any act of IGC relating to the real property at issue. The corporate defendants are therefore not liable to the city on either theory.

the judgment is affirmed.

Kaus, J.

WE CONCUR;
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
LUCAS, J.

THOMSON et al. v. *CALL et al.*
S.F. 24693

CONCURRING AND DISSENTING OPINION BY MOSK, J.

I concur in the judgment against Hubert F. Call, but I cannot agree that the corporate defendant is free of liability. The evidence is clearly to the contrary.

The trail court observed in its memorandum decision: "IGC does appear to have been guilty of one breach of its agreement . . . [with the City. . . . Though IGC was motivated solely by a desire to obtain a building permit and to protectits development, . . . it recognized that the City . . . was interested in making a public park at the top of the hill. IGC therefore used that as its inducement to the City as, for example, in the letter of November 3, 1972 offering 'to make a major effort to preserve the Albany Hill top for public use,' and promising the City's unique, superb and useful view park or the public enjoyment.' The sales agreement with Call . . . called for title free and clear of all liens, encumbrances, easements, et cetera. Notwithstanding this, . . . IGC consented to a demand of Call . . . that title be taken subject to . . . an unrestricted easement of access by the Albany Lions Club to and for maintenance of . . . [the] . . . cross which had been erected on the Call property.

"The President . . . of IGC [Wilson] testified that Call was allowed to impose the burden of the easement because IGC didn't care what restrictions might be placed upon the property as long as they did not constitute a potential threat to the development of IGC's property. . . . Allowing the property to be so encumbered can hardly be said to be consistent with 'a major effort to save and preserve the Albany Hill top for public use,' given the legal and practical complications thus entailed."

The IGC contract with the city obligated it to convey fair value to the city in the form of land suitable for use as a public park. The 1.1-acre parcel it acquired from the Calls and conveyed to the city, through Cebert, represents less than fair

value because of the extent to which its worth has been diminished by the cross and the easement. The easement protects the location and existence of the cross, which renders the land unsuitable for use as a park because of the constitutional proscriptions precluding the display of a religious symbol on public property. (Fox v. City of Los Angeles (1978) 22 Cal.3d 792, 797.)

It was IGC that allowed the land to be burdened with the easement before conveying the land to the city pursuant to the contract, although it should have been obvious that the easement negated the city's purpose in acquisition. The trial court recognized that result in its memorandum decision: "With the cross and unrestricted easement on the property . . . the property was virtually undevelopable and therefore of virtually no commercial value." And, of course, the perpetual religious symbol rendered the property legally unsuitable for park or other public purposes Nevertheless the court exonerated the corporation off liability to the city under the state of the pleadings; a separate lawsuit was suggested as a remedy for the city.

That result allows IGC to escape liability in this proceeding by an unduly narrow interpretation of the complaint. As the Court of Appeal held, deferment to future litigation rather than adjudication of liability in this action is neither in the public interest nor serves judicial economy. I would direct, as did the Court of Appeal, that on remand the plaintiffs should be permitted to amend their complaint to seek appropriate damages against IGC for breach off contract. Recovery would appear to be certain, with only the amount of damages to be determined.

MOSK, J.

I CONCUR:

BIRD, C.J.

Supreme Court, U.S.
FILED
NOV 6 [redacted]
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUBERT CALL and RUTH CALL,
Petitioners,

v.

City of Albany, California; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; Cebert Properties, Inc.; BRUCE THOMSON, ROBERT SCHARF, DARIO C. MENIKETTI, LOUIS H. BELL, JERRY J. LEAHY, THELMA RUBIN, BLANCHE VRANNA, ROBERT B. ELLIOTT, and CATHERINE J. WEBB, residents and taxpayers of the City of Albany, California,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI

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ORDER DUE
August 21, 1985

ORDER DENYING REHEARING

S.F. No. 24693

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

THOMPSON ET AL., *Appellants*

v.

CALL ET AL., *Appellants;*
CITY OF ALBANY ET AL., *Respondents*

Opinion modified.

Appellants Call et al. petition for rehearing DENIED.

SUPREME COURT
FILED
Jul 29 1985
LAURENCE P. GILL, Clerk

/s/ BIRD
Chief Justice

Bruce THOMPSON et al., Plaintiffs and Appellants,

v.

Hubert CALL and Ruth Call, Defendants and Appellants;

The City of Albany, a municipal corporation; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; and Cebert Properties, Inc., Defendants and Respondents.

A011653.
Civ. 44375.

Court of Appeal, First District, Division 4.

Nov. 16, 1983.

As Modified on Denial of Rehearing Dec. 15, 1983.

Hearing Granted Feb. 16, 1984.

RATTIGAN, Associate Justice.

Plaintiffs in this action are residents of defendant City of Albany (City). They commenced the action as a taxpayers' suit, challenging the validity of a transaction in which defendant Cebert Properties, Inc., a corporation, bought a parcel of land from defendants Hubert F. Call (Call) and Ruth L. Call, his wife, paid them $258,000 for it, and conveyed the parcel to the City, while Call was a member of the City Council.

The defendants named in the complaint included the City; the Calls; the individuals who served with Call as members of the City Council at pertinent times; Cebert Properties, Inc.; and three other corporations. After a nonjury trial, the court found and concluded that the Calls were liable to the City for the $258,000 they had received for the land, plus interest; that

the City was nevertheless to retain title to the land; and that relief was to be denied as to the other defendants.

A judgment was entered accordingly. The Calls appeal from the judgment insofar as it holds them liable to the City for the $258,000 plus interest. Plaintiffs appeal from it insofar as it denies relief as to the corporate defendants.

THE PARTIES

Plaintiffs were taxpaying residents of the City at pertinent times. The trial court found, and it is undisputed, that they had standing to maintain the action. The members of the City Council named as defendants were Call, Joseph Carlevaro, Richard Clark, George C. Hein, and Lewis M. Howell. Call, Carlevaro, Hein, and Howell (all of whom appeared in the action) were members of the City Council during 1972 and 1973.[1]

The corporate defendants named in the action were Interstate General Corporation (IGC); Interstate General Development, Inc. (IGD); Interstate Albany Corporation (IAC); and the aforementioned Cebert Properties, Inc. (Cebert). The trial court found, and it is also undisputed, that the corporate defendants were essentially interchangeable for purposes of the challenged transaction.[2] Jack Krystal, a real estate broker, was

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[1] The record does not show an appearance in the action by defendant Clark, who was also sued as a member of the City Council. It also does not show a disposition of the action as to him. Plaintiffs state on their appeal that he was "granted summary judgment prior to trial."

[2] The court found in pertinent part as follows: "Defendant IAC was at all times relevant and is a subsidiary of IGD. IGD was at all times relevant and is a subsidiary of IGC. The stock of Cebert was at all relevant times and is owned by James J. Wilson. . . . James J. Wilson was at all times relevant and is the president of IGC, IGD and IAC, and was and is a director of IGC, IGD, IAC and Cebert. For all relevant matters, IGC, IGD, IAC and Cebert, and each of them, acted as agents and servants for each other, and had unity of purpose and concurrence of action."

also named as a defendant.

THE ACTION

In each of several causes of action stated in their complaint, plaintiffs alleged that each of the corporate defendants was in effect the alter ego of the others, and that at pertinent times each had acted as the agent of the others and of the City. As pertinent to the appeals, plaintiffs further alleged a factual sequence which included these details:

In 1972, IGC applied to the City for a use permit authorizing the construction of a "condominium project" on land owned by IGC and located within the boundaries of the City. On November 13, 1972, the City Council (1) voted to grant the use permit on condition that IGC donate to the City a parcel of land to be known as "Overlook Park"; and (2) voted to accept IGC's offer of a so-called "$600,000 plan" in which IGC agreed "to donate additional land for . . . 'Overlook Park' as might be acquired by IGC through private negotiations for the sum of $600,000. . . ."

In 1973, acting "by and through defendant Cebert" in the performance of the $600,000 plan, IGC purchased a parcel of land from the Calls for $258,000. Cebert conveyed the parcel to the City. On August 21, 1973, the City Council accepted the conveyance from Cebert and "purportedly ratified" it. On August 27, 1973, the City issued an "initial building permit" authorizing construction of the project pursuant to the use permit granted to IGC in 1972.

Plaintiffs further alleged: "The transaction by which defendant IGC, acting through . . . Cebert," purchased the parcel from the Calls and conveyed it to the City, was "a prohibited transaction under Sections 1090 et seq. of the . . . Government Code . . . ."[3] As pertinent here, they also alleged that "such

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[3] Statutory citations in this opinion are to the Government Code except where expressly indicated otherwise. Section 1090 provides in

transaction, including all contracts of purchase and sale executed pursuant thereto, and all permits . . . issued as a condition, or in consequence, of such transaction, were . . . null and void and of no effect."

With these and related allegations, plaintiffs stated a total of eleven causes of action in separate counts. By their numbers, they first stated causes of action for the recovery of the $258,000 by the City, from the other defendants, on the respective grounds (1) that the entire transaction was void because of the violation of section 1090 alleged, and (2) that it included a "contract" which was void for the same reason. Plaintiffs next stated causes of action for accountings and the recovery by the City of actual "damages" (3) from Call, (4) and (5) from the other members of the City Council, and (6) from the corporate defendants and Krystal, for breaches of specified "fiduciary" duties the several defendants were respectively alleged to have owed the City.

Plaintiffs also stated causes of action for the recovery of actual "damages" by the City, from the other defendants, for (7) their alleged "constructive fraud" and (8) "conspiracy" in the transaction; (9) for the recovery of punitive damages by the City from the other defendants; (10) for injunctive relief restraining construction of IGC's project pursuant to the use permit and the building permit, and the further expenditure of public funds, on the basis that the transaction and the permits were void; and (11) for a declaratory judgment to the effects that the transaction and the permits were void.

Answers were filed by the four corporate defendants, appearing jointly, and by defendant Ruth L. Call. A joint

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pertinent part:

"1090. Members of the Legislature, state, county, district, and *city officers or employees* shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . ." (Italics added.)

answer was also filed by the City and Councilmen Call, Carlevaro, Hein, and Howell.

THE EVIDENCE

The evidence includes more than 100 documentary exhibits and extensive testimony by 17 witnesses. Despite its volume, the contentions on appeal require that it be summarized in close chronological detail. It supports the following recitals:

Albany Hill is a steep promontory in the westerly portion of the City. Its summit commands a panoramic view of the City and San Francisco Bay. In and before 1972, IGC owned 36 acres of land at the westerly base and on the adjacent slope of the hill. That side of the hill, and the summit, were undeveloped in 1972. The land at the summit consisted of four contiguous parcels. One of them was a 1.1-acre parcel owned by the Calls as joint tenants. The others were a 2-acre parcel which was the uppermost part of the 36 acres owned by IGC; a 2.2-acre parcel owned by Albany Hill Associates, a partnership; and a 2-acre parcel owned by Golden Gate Hill Development Company, a corporation.

In 1972, all of the lands described were in a hill control ("HC") district established by the City's zoning ordinance. Another ordinance provided that no building permit for the erection of any structure on land in the HC district could be issued unless a use permit had first been obtained from the City Council. IGC's 36 acres and Golden Gate Hill Development Company's continguous parcel were zoned "R1HC" (for single-family dwellings). The Calls' and Albany Hill Associates' parcels were zoned "R3HC" (for high-rise, high-density residential units).

By April of 1972, IGC had formed plans to construct and develop a 2,500-unit, high-rise residential complex on its 36-acre parcel. A representative of IGC approached James Turner, the City's administrative officer, concerning the steps necessary to obtain City approval of the project. IGC was informed at that time that the City desired to maintain as much

open space as possible on Albany Hill. In July of 1972, IGC applied to the City Council for a use permit authorizing the project. The application included a request by IGC for action by the Council rezoning the 36-acre parcel from R1HC to R3HC.

In August, 1972, the City's Parks and Recreation Commission proposed to the City Council that a site for a municipal park be acquired at the summit of Albany Hill. This site later became known as "Overlook Park." At a meeting conducted on August 28, 1972, the Council voted to "go on record as generally concurring" with the park proposal. Call was present as a member of the Council. He did not participate in the discussion of the proposal, and he abstained from the vote.

The City Council and the City Planning Commission conducted public hearings concerning the project proposed by IGC. There was general enthusiasm for it because of the prospect that it would significantly increase the City's property tax base. Members of the Council repeatedly expressed the view that the pending use permit should be subject to a condition requiring IGC to dedicate land on Albany Hill for use as parks and permanent open space.

In a communication to IGC in October, 1972, Turner and the city attorney proposed certain conditions to be included in the use permit. One of the conditions would have required IGC to dedicate to the City its 2-acre parcel at the summit of Albany Hill, for use as part of Overlook Park, and a 4-acre parcel ("Creekside Park") owned by IGC and located at the northerly base of the hill.

In a letter written to the City Council on November 3, 1972, IGC rejected the proposed condition requiring dedication of the two park sites. In the same letter, IGC also proposed the so-called "$600,000 plan." The plan would require IGC to "allocate" $600,000 of its own money for the acquisition of land for Overlook Park; to spend that sum, or less, for the acquisition of such land by IGC, through "private negotiation," as it selected; to convey any land so acquired to the City, for use as part of the

park; and to pay to the City any unexpended balance of the $600,000 for use in "condemning by eminent domain" any land required for the park but not acquired from IGC pursuant to the $600,000 plan. The express language in which IGC proposed the plan in its letter dated November 3, 1972, is quoted in the margin.[4]

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[4] IGC commenced the letter by referring to "our application to develop our property in Albany" (i.e., to its pending application for a use permit and rezoning). IGC then stated its intent "to make a major effort to save and preserve the Albany Hill top for public use. . . ." The letter continued:

"*Should our application be granted*, we agree to allocate $600,000.00 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgment, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City . . . [as] . . . Overlook Park. [¶] While this property is not subject to any public use by the City and has not been heretofore the subject of any litigation in eminent domain for acquisition by the City, the developer is agreeable to providing the City, not as a consideration or a condition of the zoning application, but in the general overall public interest, with no countervailing advantage to the developer, *concurrent with the issuance of the first construction permit*, by deed to the City, as a gift, such of the real property as it has been able to acquire for the $600,000.00 that the City is agreeable to using as a gift for the sole purpose of being a permanent park and open space for the City. . . .

"This land, together with the acreage that we will be dedicating . . . , will provide the City of Albany and its citizens with a unique, superb and useful view park for the public enjoyment and open space. If, in our negotiations, we are unsuccessful in concluding purchase arrangements with the private landowners who own real property within the area of the proposed park, we reverse the right to pay over to the City of Albany all unexpended funds, as a gift and not as a consideration of any zoning application, from the $600,000.00 so that the City may use these funds solely for condemning by eminent domain all of the lands that the City requires for this Albany Hill Overlook Park only." (Italics added.)

Another proposal by the City was communicated to IGC in a letter written by Turner and the city attorney on November 10, 1972. They again suggested a condition of the use permit which would require IGC to convey its 2-acre and 4-acre parcels to the City for use as parks. They also requested that IGC "reiterate" its offer of the $600,000 plan as stated in its letter dated November 3, 1972.

In a letter to the City Council dated November 12, 1972, IGC stated that it was thereby "submitting in final form" the conditions it would accept in the use permit. IGC also stated: "We are prepared to make a gift of either of the two park sites to the City . . ., but not both of them, and we hereby reiterate our offer contained in our letter of November 3, 1972, to allocate $600,000.00 for the purpose of first purchasing additional private property to encompass the proposed Overlook Park of Albany Hill, all at or above the 200′ contour of the hill, and for the Albany Hill Overlook Park only, and to donate, in addition," its (IGC's) 2-acre parcel at the summit of the hill. The only land not owned by IGC at or above the 200-foot "contour" (i.e., elevation) of Albany Hill consisted of the contiguous parcels owned by the Calls, Albany Hill Associates, and Golden Gate Hill Development Company.

The formulation and purpose of the $600,000 plan were explained in testimony by James J. Wilson, who was the president or a director (or both) of each of the four corporate defendants. (See fn. 2, *ante*.) Wilson was in charge of IGC's proposed project from its inception. He described himself as the "architect" of the $600,000 plan. He testified that as early as 1971 he had resolved to purchase the land at the summit of Albany Hill, or to have it dedicated to the City for use as a park, in order to eliminate the possibility of a high-rise development uphill from the project proposed by IGC. Wilson had in mind that high-rise units above IGC's project would seriously compromise the privacy (and consequently the value) of the units they would overlook.

Because the parcel owned by Golden Gate Hill Development Company parcel was not zoned for high-rise units, Wilson was

primarily concerned with the parcels owned by the Calls and Albany Hill Associates. He was willing to spend up to $1,000,000 to acquire these two parcels because of their "nuisance" potential. He hoped to acquire them for less, through the $600,000 plan, by using the threat of their condemnation by the City as a weapon in negotiations. He testified that "in effect, we were holding a club over the heads of these . . . people."

The City Council acted on IGC's application at a meeting conducted on November 13, 1972. In the first of three successive votes, the Council amended the City's zoning ordinance to rezone IGC's 36-acre parcel from R1HC (single-family dwellings) to R3HC (high-density, high-rise residential units). The Council next voted to grant use permit No. 20 to IGC on specified conditions. One of the conditions required IGC, "concurrent with the issuance of the first construction permit" for the project, to convey its 2-acre parcel at the summit of Albany Hill to the City "for the sole purpose of being a permanent park and open space for the City."

The $600,000 plan was not mentioned among the conditions of use permit No. 20 as granted. The plan was reached in the third action taken by the City Council, when a majority voted that "the City . . . accept the offer of . . . [IGC] . . . of [*sic*] their letters of November 3, and November 12, for allocation of $600,000.00 for the purpose of purchase of additional private property to encompass the proposed Overlook Park of Albany Hill."

Call was present at this meeting. He voted to rezone IGC's property, and to grant use permit No. 20. He abstained from the vote that the City "accept the offer" of IGC relative to the $600,000 plan.

Shortly after the meeting, IGC placed Eugene Hill in charge of proceeding with the project under Wilson's supervision. In discussions with Turner, it was made clear to Hill that the first building permit would not be issued until land had been acquired pursuant to the $600,000 plan. When this was

reported to Wilson, he instructed Hill to obtain appraisals of the hilltop parcels owned by the Calls, Golden Gate Hill Development Company, and Albany Hill Associates.

Hill retained Elliott Balol, a land appraiser, for this purpose. Ball appraised the Calls' 1.1-acre parcel at $63,800; the upper portion of Golden Gate Hill Development Company's parcel at $31,900 per acre; and Albany Hill Associates' 2-acre parcel at $211,700. Wilson instructed Hill to offer these amounts to the respective owners. Hill communicated offers to the owners of the three parcels in letters written on IGC's behalf in March of 1973.

In response to IGC's offer of $63,800 for the Call's parcel, Call wrote a letter to Hill describing recent sales of "comparable zoned properties" in the City. Call also stated: "While we have no interest in selling at this time, we would be agreeable to having the property go into a park for the City of Albany. From the comparables listed above, our property is clearly worth $360,000. . . . [¶] In view of above mentioned, your offer is unacceptable. I would be willing to meet and negotiate."

None of the IGC's offers was accepted. Wilson told Hill to have someone else negotiate with the owners. Hill selected defendant real estate broker Jack Krystal and authorized him in a letter to negotiate for the acquisition of the three parcels by IGC. Hill stated in the letter that any real estate commissions involved were to be paid by the sellers. At or about the same time, he informed Krystal of the offers which had previously been made for the parcels.

Krystal offered Golden Gate Hill Development Company $40,000 for its 2-acre parcel. He was informed in effect that a sale of the parcel was not possible at the time, and he abandoned negotiations for its acquisition. He offered Albany Hill Associates $211,700 (Ball's figure) for its 2.2-acre parcel. The partners in Albany Hill Associates were Wallace D. Runswick and Jordan Rust. In subsequent negotiations with Krystal, they agreed to sell the parcel to IGC for $340,000. Runswick testified in effect that he thought the parcel was worth substan-

tially more, but that he agreed to sell it for $340,000 because he recognized a threat that the City would otherwise take it by eminent domain at greater expense to himself and Rust.

Krystal commenced negotiations with the Calls by offering them $180,000 for their 1.1-acre parcel. Call eventually agreed to sell it to IGC for $258,000. At all times while he was negotiating with Krystal, Call knew that IGC was acquiring the parcel for conveyance to the City pursuant to the $600,000 plan.

In June of 1973, Krystal prepared and presented written contracts for the sales by the Calls and Albany Hill Associates. Each contract was on a standard printed form entitled "Real Estate Purchase Contract and Receipt for Deposit." In the contract presented to the Calls, IGC offered to buy their 1.1-acre parcel for $258,000. Hill signed the offer, which was for title to the parcel "free of liens, encumbrances, easements, . . . and conditions of record . . . other than exceptions of record" shown in a preliminary title report attached to the contract. IGC also stated in the offer that "closing of this transaction . . . is conditioned upon purchaser being issued all necessary permits to a project [sic] located adjacent to this property."

The Calls accepted the offer by signing the contract on June 29, 1973. At about the same time, Runswick signed a similar contract in which Albany Hill Associates agreed to sell the 2.2-acre parcel to IGC for $340,000.

Written escrow instructions for the two sales were executed and delivered to an escrow holder in August of 1973. IAC delivered buyer's instructions with which it deposited in escrow an application for the first-phase building permit; the sum of $600,000 (the full amount "allocated" for the acquisition of land in the $600,000 plan); and the further sum of $68,012.35, which was the total of fees and charges payable to the City upon issuance of the building permit. IAC instructed the escrow holder to comply with the sellers' instructions "regarding acquisition of land," to pay "any remaining surplus balance" of the $600,000 to the City, and to pay the $68,012.35 to the City,

upon the receipt in escrow of a building permit issued by the City pursuant to the application.

IGC designated Cebert as the actual buyer of the two parcels from Albany Hill Associates and the Calls. With instructions signed by Runswick and Rust, Albany Hill Associates deposited in escrow a grant deed conveying its 2.2-acre parcel to Cebert. The escrow holder was instructed to deliver the deed when it held for the seller's account "the sales price of $340,000 less deductions" to be paid out as shown on an itemized list. The "deductions" included $12,000 to be paid to Krystal as a real estate commission.

The Calls deposited two grant deeds in escrow with their instructions. They instructed the escrow holder to deliver both deeds when it held for their account "the sales price of $258,000 less deductions" itemized by them. The "deductions" included $5,000 to be paid to Krystal as a real estate commission.

One of the deeds deposited in escrow by the Calls was a grant deed whereby they conveyed the 1.1-acre parcel to Cebert. The other was a grant deed whereby they conveyed to the Albany Lions Club "an easement" on the parcel "for ingress and egress to maintain the existing cross standing on a portion" of the parcel. This "cross" was variously described in the evidence as a "large monumental cross" and a "Christian type cross." The Calls had permitted the Albany Lions Club to erect it on the 1.1-acre parcel in 1971. It was made of steel, stood 15 to 20 feet high, and was firmly anchored in a permanent base. By reason of its location at the summit of Albany Hill, the cross could be seen from all areas of the City. It was illuminated at night during the Christmas and Easter seasons.

Because the easement on the parcel was newly established by the Calls, it was not an "exception of record" to their title within the meaning of their written contract for the sale of the parcel to IGC. Asked about its establishment in the escrow, Krystal testifed that Call had "insisted prior to closing of the transaction . . . that IGC agree to placing a permanent easement and access to the cross for the benefit of the Lions Club."

Krystal also testified that Hill agreed to the easement. Call testified that he told Krystal he would sign the written contract for the sale of the parcel "'on one condition, . . . that the cross will remain there permanently and an easement over the property to the cross is granted.'"

Wilson testified that Hill told him that Call had added the easement condition "during the negotiation of the contract." Wilson would not have been willing to pay as much for the 'Calls' parcel, with the "easement on it," because if Call "had the right to keep that cross where it was, it would have affected the value of the property." However, Wilson further testified that he was indifferent to the creation of the easement in any event: "Once we started our project, it didn't make any difference at all where the cross was located or whatever else happened. it was then the problem of the City, because it was their land." Wilson did not object to Call's demand that the 1.1-acre parcel be burdened with the easement before it was conveyed to Cebert (and by Cebert to the City).

Cebert deposited in the escrow a grant deed dated August 17, 1973, whereby it would convey title to both parcels to the City. The deed did not show that title to the Calls' 1.1-acre parcel was to be conveyed subject to an easement held in connection with the cross. Acceptance of the deed by the City Council, prior to its recordation, was required by statute. (See § 27281.) In addition, a lending institution which was to finance the construction of IGC's project had requested action by the City Council "ratifying" the land acquisitions being made pursuant to the $600,000 plan.

Action on these matters was taken at a meeting of the City Council conducted on August 21, 1973. The Council first adopted resolution No. 73-66, by which it approved a tentative map of IGC's project. Call voted for resolution No. 73-66. The Council next adopted resolution No. 73-76, in which it stated that the "Grant Deed from Cebert . . . to the City of Albany . . . as Grantee, dated August 17, 1973, be, and the same is hereby accepted. . . ." The Council then adopted the "ratify-

ing" resolution (No. 73-78), in which it stated in pertinent part that it did "approve and ratify the purchases of the certain real properties . . . described in that Grand Deed referred to in Resolution No. 73-76." Call abstained from voting on resolutions 73-76 and 73-78.

This meeting was preceded by a work session at which only Turner, the city attorney, and Councilman Howell (who was the mayor) were present. Turner and the city attorney informed Howell of the details of the purchases of the Calls' and Albany Hill Associates' parcels by IGC, and of the conveyance of the parcels to the City by Cebert, which were subject to ratification and acceptance by the City Council at the forthcoming meeting. They also told Howell that the Council was meeting to consider acceptance of the parcels and to determine that the prices paid for them by IGC were reasonable. Howell was advised to have Turner explain these matters, at the meeting, for the information of the other members of the Council and the public.

At the formal meeting, Turner was not asked to give this explanation and none was given. He stated in a memorandum of the meeting that "the only basic information available to the Council in determining value, was to the extent that only $2,000.00 was left from the acquisition of the 3.2 acres out of a total of $600,000.00." Testimony by Councilman Howell supported inferences that he generally understood the details of the $600,000 plan and of the actions taken by the City Council at the meeting. Testimony by Councilmen Carlevaro and Hein fairly showed that they were not informed of these details and did not understand them. Call testified that when he learned of the deeds, at the meeting, he "asked, 'Was the cross and all recorded in that,' and it was." There was no evidence that the other members of the Council were informed that the Calls' 1.1-acre parcel was being accepted by the City subject to the easement to be held in connection with the cross.

On August 23, 1973, the City deposited the required building permit in escrow with instructions signed by Turner and the

city attorney. They instructed the escrow holder to deliver the permit when it held for the City the amount of $68,012.35 "and the further sum of $2,000.00, which represents the unexpended sums for the purchase of the properties. . . ." They explained in the instructions that "a total sum of $598,000.00 was expended for the purchase of the properties, which leaves a balance of $2,000.00 of the original $600,000.00 agreement [*sic*]." The building permit deposited in escrow was "conditioned" in part on the "requirements" of the $600,000 plan.

The escrow closed on August 24, 1973, pursuant to the parties' instructions. Albany Hill Associates' deed conveying the 2.2-acre parcel to Cebert was recorded. The Calls' deed granting an easement on their 1.1-acre parcel to the Albany Lions Club was recorded ahead of their deed conveying the parcel to Cebert. The deed by Cebert conveying both parcels to the City was recorded last. The City thus acquired the Calls' parcel subject to the easement held by the Lions Club. The building permit authorizing the commencement of construction of IGC's project was delivered from the escrow. Large-scale construction of the project was started shortly afterward.

Detailed and conflicting evidence was received as to the fair market value of the Calls' 1.1-acre parcel in 1973. Elliott Ball, who appraised it for IGC, fixed its value at $63,800 as of February 18, 1973. G. Michael Yovino-Young, an appraiser called by plaintiffs, testified that the value of the parcel was $100,000 in March of 1973. John R. Barton, an appraiser who testified for the Calls, fixed its value in August, 1973, at $450,000. These appraisers arrived at their respective figures on the bases that the highest and best use of the 1.1-acre parcel was for the high-density residential construction which its R3HC zoning permitted. Ball's figure of $63,800 was based on his estimate that the parcel would accommodate 22 units evaluated at $2,900 per unit for appraisal purposes. Yovino-Young's figure of $100,000 was based on an estimate of 35 units evaluated at approximately $3,000 per unit. Barton's figure of $450,000 was based on 90 units at $5,000 per unit.

Wilson testified that he disagreed with Ball's opinion that only 22 units could be constructed on the parcel, and that his (Wilson's) calculation of the total $600,000 figure was based in part on his estimate that the parcel would accommodate 90 units evaluated at $3,000 per unit. A real estate broker testified that a client of hers had offered Call $450,000 for the parcel in 1973, and that this figure was based on 90 units at $5,000 per unit.

The Calls had acquired the parcel in 1970. The price they had paid for it was much lower than any of the appraisers' evaluations, but there was evidence that the pendency and size of IGC' project had substantially increased the market value of the parcel and nearby property in 1972 and 1973. On the other hand, testimony by several witnesses supported an inference that the value of the parcel had been severely diminished by the location of the "monumental cross" on it, and by the easement granted to the Albany Lions Club, because they would prevent or limit the construction of high-rise, high-density residential units on the parcel consistent with its highest and best use and its zoning. There was no evidence of its diminished value as such.

During the trial, plaintiffs dismissed the action with prejudice as to defendant real estate broker Jack Krystal. At the close of plaintiffs' case, Councilmen Carlevaro, Hein, and Howell moved for judgment in their favor pursuant to Code of Civil Procedure section 631.8. The motion was granted.

POST-TRIAL PROCEEDINGS

The trial court filed a memorandum decision in which it reviewed the evidence in detail and stated its determinations (among others) that the transaction shown had produced a "single contract" which was void for violation of section 1090 because Call, a member of the City Council, had a "proscribed financial interest" in it; that the remedy to be applied called for the retention by the City of the parcel of land sold by the Calls for $258,000; that it also required a "forfeiture" of the $258,000

by the Calls to the City; and that the other defendants were not to be held liable to the City in any respect.

The Calls thereupon moved for leave to amend their answer to conform to the proof. They proposed amendments whereby they would plead affirmative defenses based on allegations that the City was "estopped from profiting" at their expense because throughout the disputed transaction they had acted on the advice of the city attorney in specified respects. The motion was denied.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial court signed and filed elaborate findings and conclusions which must be summarized and quoted at length. The court first made more than 40 findings in which the events shown in the evidence were recited in exhaustive chronological detail. The court then found that there had been a "single agreement" between IGC and the City; that the "terms and conditions" of the agreement" were "reflected" in specified documentary sources and actions taken by the City Council; and that "Call had a financial interest in said agreement." The court concluded from these findings that Call's financial interest was an "interest proscribed" by section 1090; that by reason of the "proscribed financial interest" the Calls were indebted to the City in the full amount of the $258,000 they had received for the land, plus interest on it from August 21, 1973; that they were not entitled to return of the parcel; and that title to it would remain in the City.[5]

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[5] These findings and conclusions are quoted in their contexts, and in pertinent part, as follows:

"Findings Of Fact

". . . .

"44. The purchases of real property by IGC through Cebert, and the conveyances of said real property to the City were in performance of a single agreement entered into between IGC and the City, the terms and conditions of which are reflected in IGC's letters of

The court also made findings in which it recited the facts relative to the existence and use of the "monumental cross" on the Calls' parcel; that their contract for the sale of the parcel to IGC was "silent concerning the cross," but that Call had "insis-

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November 3, 1972 and November 12, 1972, the relevant resolutions adopted by the Council concerning the Use Permit, the $600,000 Plan, the acceptance of deeds [*sic*] from Cebert and the ratification of purchases made by IGC or Cebert of real property for conveyance to the City, the Use Permit, the Building Permit, the Real Estate Purchase Contracts and Receipts for Deposit concerning the Call Parcel and the Albany Hill Associates Parcel, and the escrow instructions. . . . Call had a financial interest in said agreement.

". . . .

"Conclusions Of Law

". . . .

"3. Call's financial interest in the agreement as set forth in Finding of Fact No. 44 between IGC and the City was an interest proscribed by . . . [Government Code section] . . . 1090, which provides that 'City officers of employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.'

". . . .

".5. Because of the proscribed financial interest in the agreement between IGC and the City, pursuant to which Ruth and Hubert Call received $258,000 for the Call Parcel, and because the Call Parcel was owned by Ruth and Hubert Call jointly, and sold and conveyed by them jointly, Ruth and Hubert Call are indebted to the City in the full amount received by them in the performance of the agreement, which amount is $258,000. Furthermore, because said liability is for a liquidated amount, received by Ruth and Hubert Call pursuant to specific action of the City on a specific date, Ruth and Hubert Call are liable to the City for interest on the $258,000 at the rate of 7% per annum from August 21, 1973 until paid in full. Finally, because the agreement under which Ruth and Hubert Call received the aforementioned monies was prohibited by statute, specifically . . . [section] . . . 1090, Ruth and Hubert Call are not entitled to a return of their property given in consideration for said agreement, and title to the Call Parcel remains and shall remain in the City of Albany."

ted" that the parcel "be burdened with an easement for the maintenance of the cross, and IGC offered no objection"; and that the cross was standing on the parcel when the City Council accepted the deed from Cebert on August 21, 1973, and when the City "took title" to the parcel. In finding No. 51, the court stated that the City's acceptance of the deed "had a secular purpose," in that the parcel was accepted "for use by the public as a park." In conclusions of law Nos. 13 through 15, the court determined that the City's acceptance of the parcel "neither advanced nor inhibited religion," and that it "did not constitute excessive governmental entanglement with religion" or "action in violation of the First Amendment to the United States Constitution."

In other findings and conclusions made in response to specific causes of action stated in the complaint, the court determined that the defendants other than the Calls were not liable to the City and that there had been no "conspiracy" or "fraud" in the transaction.[6] Addressing the cause of action for

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[6] These findings and conclusions are also quoted in their contexts, as follows:

"Findings Of Fact

". . . .

".52. IGC, IAC, IGD and Cebert breached no duties owed to the City of Albany, complied with all conditions imposed upon it [*sic*] by the City of Albany, and performed all obligations owed by it to the City of Albany, in the issues raised by the pleadings in the subject litigation.

".53. No defendant in the subject litigation was involved in a conspiracy to defraud the City, to breach any fiduciary duties owed to the City, to cause a violation of . . . [section] . . . 1090, or to cause an illegal expenditure of public funds."

".54. No defendant in the subject litigation was guilty of perpetrating a fraud, actual or constructive, on the City.

"Conclusions Of Law

". . . .

".2. With respect to the $600,000 Plan, and the satisfaction of its

injunctive relief restraining further construction of IGC's project on the further construction of IGC's project on the basis that the use and building permits were void, the trial court stated in three conclusions of law that the permits were valid.[7]

THE JUDGMENT

Consistent with the findings and conclusions, the court entered a judgment in which it ordered in pertinent part that "Plaintiffs, on behalf of the City of Albany, have and recover from defendants . . . Call the sum of $258,000 with interest thereon at the rate of 7% per annum from August 21, 1973," and that "Plaintiffs take nothing by their complaint from defendants . . . [IGC, IGD, IAC, or Cebert]. . . ." The Calls and plaintiffs filed separate notices of appeal from the judgment.

REVIEW

On their appeal, the Calls claim error in the trial court's findings and conclusions which produced the judgment against

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obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany.

". . . .

".6. Councilmen Howell, Carlevaro and Hein exercised bad judgment in their consideration and acceptance of the $600,000 Plan in November, 1972, but no liability to the City arose thereby.

".7. Council Howell and Carlevaro [*sic*] are not liable to the City in any amount or at all for their acceptance of the grant deeds [*sic*] from Cebert and in their ratification of the real property purchases made pursuant to said $600,000 Plan, because of the terms of the $600,000 Plan, and the discretion vested in IGC thereby. . . ."

[7] The court stated in two of these conclusions (Nos. 10 and 11) that the use permit granted on November 13, 1972, and the building permit issued "in August of 1973" were "issued in conformance with all laws" and were "valid and proper." In conclusion of law No. 11, the court further stated: "No alleged failure of IGC, IGD or IAC to perform property and fully any obligations owed by any of them to the City of Albany under the $600,000 Plan, nor any alleged or purported breach by any of them of any such obligation, affects the validity of either the use permit or the building permit. . . ."

them in the amount of $258,000 plus interest. On the companion appeal, plaintiffs claim error in the judgment insofar as it does not hold IGC (meaning the corporate defendants) liable to the City in at least that amount, as damages, and denies injunctive relief restraining IGC from further construction of its project. These points and others are discussed in an appropriate sequence.

I

We first consider the findings and conclusions principally challenged on the appeal by the Calls. The trial court did not expressly find or concluded that the agreement between IGC and the City was "void" by reason of Call's "proscribed financial interest," but its findings of the agreement *and* the "interest" (in finding No. 44), and its definition of the latter as an "interest proscribed" by section 1090 (in conclusion of law No. 3), established that the agreement was affected by a violation of section 1090. It has been held in a consistent line of decisions that a contract which involves a violation of section 1090 or related enactments (e.g., former Pol.Code, § 920) is void. (*Moody v. Shuffleton* (1928) 203 Cal. 100, 103-105, 262 P. 1695; *Berka v. Woodward* (1899) 125 Cal. 119, 126-129, 57 P. 777; *Miller v. City of Martinez* (1938) 28 Cal. App.2d 364, 370-372, 82 P.2d 519; *Hobbs, Wall & Co. v. Moran* (1930) 109 Cal.App. 316, 318-320, 293 P. 145; *County of Shasta v. Moody* (1928) 90 Cal.App. 519, 521-523, 265 P. 1032; *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 599-603, 229 P. 1020; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 568-571, 25 Cal.Rptr. 441, 375 P.2d 289; *People v. Deysher* (1934) 2 Cal.2d 141, 146, 40 P.2d 141; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213, 145 Cal.Rptr. 461; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 289-292, 295 P.2d 113.) We read finding No. 44 and conclusion of law No. 3 as a necessarily implied determination by the trail court that the agreement between IGC and the City was void by reason of Call's "proscribed financial interest" in it.

The court did not expressly find when the agreement came into existence between IGC and the City, but this is shown in

the evidence. IGC proposed the $600,000 plan, and offered to perform it, in its letter to the City Council dated November 3, 1972. The explanation of the plan in the letter includes disclaiming references to IGC's dedicating its 2-acre parcel to the City "as a gift," and paying "all unexpended funds" to the City, with neither action to be deemed "a consideration of any zoning application. . . ." (See fn. 4, *ante*.) In the same context, however, IGC offered to perform the plan "[s]hould our application be granted" and "concurrent with the issuance of the first construction permit. . . ." (See *ibid*.) The combination of these passages is ambiguous, but it fairly appears—despite the disclaiming references—that IGC thus offered to perform the $600,000 plan on *condition* that is application for a use permit be granted and that a construction permit be issued in consequence.

It is clear that IGC's offer was "reiterated" in its letter dated November 12, 1972, and that the City Council accepted it at the meeting conducted on November 13, 1972. The combination of the offer, the acceptance, and the express exchange of consideration established that IGC and the City entered into the agreement on the date according to the elementary law of contracts. (See Civ.Code, §§ 1549, 1550, 1605; 1 Witkin, Summary of Cal.Law (8th ed. 1973) Contracts, §§ 2, 96, 135-136, 150-153, 158, 557.) Any ambiguity as to whether the issuance of a construction permit was a condition of the agreement was resolved by the subsequent conduct of the parties when that condition was expressed in the sales contracts and the construction permit itself. (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 752-754, 8 Cal.Rptr. 427, 356 P.2d 171; 1 Witkin, *op. cit. supra*, Contracts, § 527.)

Call was not a party to the contract, and we shall have occasion to return to this fact. He nevertheless had a potential financial interest in it when the City and IGC entered into it on November 13, 1972, because its performance by IGC clearly portended a sale of the 1.1-acre parcel owned by him and his wife. He acquired an actualy financial interest in it not later

than the time of closing of the escrow in which they conveyed the parcel to Cebert and it was conveyed to the City. His interest in the contract was consequential and indirect, but it was established for purposes of section 1090. (See *People v. Deysher, supra*, 2 Cal.2d 141 at p. 146, 40 P.2d 141.) The evidence thus supports the trial court's implied determination that the contract was void for Call's violation of the statute.

II

The Calls contend that the purchase of their 1.1-acre parcel was not a "condition" of the contract when IGC and the City entered into it on November 13, 1972; that the purchase was subsequently negotiated in the performance of the contract by IGC; and that the contract was accordingly valid on the authority of *Escondido Lumber etc. v. Baldwin* (1906) 2 Cal.App. 606, 84 P. 284. That case involved an agreement between a school board and a contractor for the construction of a school building. (*Id.*, at p. 607, 84 P. 284.) In performing the agreement, the contractor bought lumber from a corporate supplier of which a member of the school board was a shareholder and an employee. (*Ibid.*) The question was whether the contract for the purchase of the lumber was void by reason of a statute which was similar to section 1090 in that it prohibited a school trusteee from being "interested in any contract made by the board of which he is a member. . . .'" (2d Cal. App. at p. 608, 84 P. 284.) The Court of Appeal held that it was neither "void" nor "voidable" because of the "mere fact" that the building contractor, "without previous arrangement or agreement, saw fit" to buy the lumber from the supplier. (*Ibid.*) The court also pointed out that the building contractor had "a right to purchase his materials in the open market. . . ." (2 Cal.App. at p. 609, 84 P. 284.)

The facts shown here are wholly distinguishable. The prospect that IGC's performance of its contract with the City would involve its acquisition of the Calls' land, and the conveyance of the land to the City, was contemplated by all parties when the contract was entered into on November 13, 1972. The land was

one of only three parcels at the summit of Albany Hill which were expressly targeted in the contract for acquisition by IGC and conveyance to the City. These facts amounted to a "previous arrangement" which was missing in *Escondido Lumber*, and the limitation of the contract to the three parcels precluded its performance by IGC in the "open market" as the term was used in that decision. (See 2 Cal.App. 606 at pp. 608 and 609, 84 P. 284, quoted *supra;* see also *City Council v. McKinley, supra,* 80 Cal.App.3d 204 at pp. 213-214, 145 Cal.Rptr. 461.) *Escondido Lumber* does not apply as claimed.

III

The Calls also contend that the acquisition of their parcel by the City did not involve a violation of section 1090 because the land at the summit of Albany Hill had been "earmarked" for acquisition by the City for use as a park, and the sale of their parcel was consequently commanded by its "unique location." They argue that "necessity will excuse a transaction otherwise prohibited because of a potential conflict of interest." The authority cited for this argument is *Capital Gas Co. v. Young* (1895) 109 Cal. 140, 41 P. 869, in which gas had been furnished to a city by a utility of which the mayor of the city was a stockholder. (*Id.*, at p. 141, 41 P. 869.) The question was whether payment for the gas was precluded by a provision in the city's charter similar to section 1090. (*Id*, at p. 142, 41 P. 869.) A judgment validating payment by the city was affirmed on the principal grounds that the utility was obligated by law to furnish the gas; that it was subject to a specified statutory penalty for failure to do so; and that its performance of a legally mandated act under pain of penalty could "not be adjudged illegal." (*Id.*, at p. 144, 41 P. 869.) Neither IGC nor Call was subject to a comparable obligation or penalty in the present case. The rule of "necessity" established in *Capital Gas* has no application.

The Calls make a somewhat similar argument on the authority of an opinion by the Attorney General in which an "exception" to the "common law conflict of interest standardd"

is defined as follows: ". . . [I]t would seem to be a settled rule of necessity where an administrative body has a duty to act upon a matter involving public improvement financing and it is the only entity capable of acting in the matter, the fact that one or all members may have a personal interest in the result of the action does not disqualify them to perform their duty. [Citations.]" (54 Ops.Cal.Atty.Gen. 154, 157 (1971).) None of the City Council's actions relative to the $600,000 plan was "a matter involving public improvement financing" within the meaning of the language quoted. The "exception" claimed here does not apply.

IV

The Calls argue the defense of estoppel which they raised on their post-trial motion for leave to amend their answer to conform to the proof. They also claim error in the denial of the motion. They contend that Call acted on advice by the city attorney "that his transaction would not be inappropriate if he made a full public disclosure of his ownership and if he abstained from debating and voting on all matters which concerned his land." The Calls cite authorities which establish that the doctrine of estoppel may be applied against a governmental agency in certain cases where all its elements are present. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-490, 91 Cal.Rptr. 23, 476 P.2d 423; *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 670-671, 197 P.2d 710; *Phillis v. City of Santa Barbara* (1964) 229 Cal. App.2d 45, 57-61, 40 Cal.Rptr. 27.)

None of the cited decisions involved a violation of section 1090 by officers of the public agencies involved. There was evidence that Call followed advice given by the city attorney on the several occasions when he abstained from voting with the City Council on questions affecting the Calls' land, or the $600,000 plan, or both. A city councilman within the reach of section 1090 may not avoid its consequences by merely abstaining from a formal vote on matters in which he has the financial interest proscribed by the statute. (*City of Imperial Beach v.*

Bailey (1980) 103 Cal. App.3d 191, 195, 162 Cal.Rptr. 663; cf. *Stigall v. City of Taft, supra*, 58 Cal.2d 565 at pp. 567-571, 25 Cal.Rptr. 441, 375 P.2d 289.)

Turner testified that the city attorney reviewed the $600,000 plan for its "legality and legal sufficiency," and approved it, before the City council accepted IGC's offer at the meeting conducted on November 13, 1972. The city attorney testified that he advised Call not to vote on is acceptance at that meeting, but that he did not advise any member of the Council that there was "any impropriety in their acting" on IGC's offer. Councilman Carlevaro testified to the same effect. The city attorney also testified that he advised Call not to vote on resolutions 73-76 and 73-78 on August 21, 1973, but that he did not advise any member of the City Council that "there was any impropriety in the City's acceptance of property that had formerly been owned by Mr. Call, a City Councilman."

This evidence supports an inference that the entire transaction was permitted to run its course because the city attorney was oblivious to the prospect that the contract constituted by the $600,000 plan was void because Call had a financial interest in it, within the meaning of section 1090, whether he voted on it or not. The evidence thus weighs in Call's favor on the question whether he was guilty of any wrongdoing in the transaction, and we return to it when we reach that question. On the Calls' point that it supports validation of the contract on the grounds of estoppel, however, there is a "well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public. . . .' [Citation.]" (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462 at p. 493, 91 Cal.Rptr. 23, 476 P.2d 423.) Section 1090 embodies such a rule. (See, e.g., *Berka v. Woodward, supra*, 125 Cal. 119 at pp. 125-127, 57 P. 777; *City Council v. McKinley, supra*, 80 Cal.App.3d 204 at p. 213, 145 Cal.Rptr. 461; *Schaefer v. Berinstein, supra*, 140 Cal.App.2d 278 at p. 290, 295 P.2d 113.) We perceive no basis for permitting the Calls to "nullify" the rule by applying the

doctrine of estoppel against the City. The trial court did not err in denying their motion for leave to plead estoppel as an affirmatiuve defense.

V

The Calls also suggest that Call's "interest" in the contract between IGC and the City was not proscribed by section 1090 because it was "remote." A "remote" interest, which will not invalidate a contract pursuant to section 1090, is defined in trailing statutes to include the "interest" of a public officer who has one of several specified relationships with the party who enters into the contract with the public agency involved. (See § 1091, subds. (a), (b); § 1091.5.) Call had no such relationship with IGC. His interest in its contract with the City was not "remote" for purposes of section 1090.

VI

The Calls contend in effect that the City's acquisition of their land was constitutionally invalid because the land was "burdened . . . [with] . . . a cross." The basis of this contention is the City Council's acceptance of the land with the "Christian type cross" standing on it subject to the protection of the easement previously granted to the Albany Lions Club. The authorities cited for the point are constitutional proscriptions pertaining to religion (U.S. Const., First Amend.; Cal.Const., art. I, § 4) and various decisions applying them (e.g., *Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948; *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663).

We later observe that the cross and the easement present problems requiring consideration, and that some of them involve the constitutional proscriptions cited by the Calls. In the first instance, however, these problems were created when Call insisted on establishing the easement before the land was sold to Cebert for conveyance to the City. The Calls will not be

permitted to escape the consequences of section 1090 by reason of problems of their own making.

As will also appear, moreover, the constitutional problems presented by the cross and the easement pertain only to the value of the land at relevant times and its use as a public park in the future. They do not reach the trial court's determinations in finding No. 51 and conclusions of law Nos. 13 through 15, which were to the effect that the *acquisition* of the land by the City was valid because it "had a secular purpose" and did not otherwise violate the constitutional proscriptions pertaining to religion. These express determinations are supported by the evidence and the law. (See, and compare, *Fox v. City of Los Angeles*, *supra*, 22 Cal.3d 792 at pp. 797-799, 150 Cal.Rptr. 867, 587 P.2d 663; *id.*, at pp. 803-813, 150 Cal.Rptr. 867, 587 P.2d 663 (conc. opn.).) The existence of the cross and the easement does not affect the determination that the contract between IGC and the City was void because Call was a "financially interested" in it within the meaning of section 1090.

VII

The Calls also challenge the effect of the judgment as a "forfeiture," contending that it amounts to an award of "punitive damages" in requiring them to pay the $258,000 to the City. We first examine whether the trial court intended it to be "punitive" in the literal sense claimed. Plaintiffs alleged in their third cause of action that Call had been guilty of wrongdoing in having breached his "fiduciary duty" to the City in specified respects. As pertinent here, they charged that he had wrongfully "participated in concert with other defendant members of the Council" in the transaction, that he had influenced them, and that he had influenced them, and that he had arranged to be paid an "artificially inflated price" for the Calls' parcel, to the "detriment" of the City in each instance.

Call was effectively absolved of having wrongfully "participated in concert" by finding No. 53, in which the trial court negated the involvement of any defendant in a "conspiracy."

(See fn. 6, *ante*.) He was absolved of "fraud" in finding No. 54. (See *ibid*.) There was no finding that he influenced any other member of the City Council, but there was no evidence that he did. There was conflicting evidence as to the value of the 1.1-acre parcel when the Calls sold it; the court made no finding of its value at any time; and there was consequently no determination that the Calls negotiated and were paid an "inflated" price for it. The court made no finding that Call had acted wrongfully in burdening the land with the easement before it was sold, but the duty to convey unburdened land to the City was an obligation of IGC under its contract with the City: it was not a "fiduciary duty" owed to the City by Call.

For these reasons, the findings actually made by the trial court have the effect of exonerating Call from any wrongdoing in the transaction. They are supported by the evidence that he and the other members of the City Council were not advised by the city attorney of the implications and effect of section 1090. The money judgment against the Calls is therefore a result of the trial court's implied determination that the contract was void. It is not an award off punitive damages, and it is not "punitive" in the sense that the court intended to punish them for wrongdoing.

It is unmistakably a "forfeiture," however, and the trial court labelled it as such. This appears in its memorandum decision, to which we may resort for the purpose of determining the process by which it reached its conclusions. (*Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 446, fn. 8, 91 Cal.Rptr. 6, 476 P.2d 406; 6 Witkin, Cal. Procedure (2d ed. 1970) Appeal, § 231.) The memorandum decision shows that the court examined the authorities dealing with section 1090; concluded that they were unclear as to the remedy to be applied here; considered alternative dispositions whereby the Calls would pay the $258,000 to the City and the City would proceed in variations of eminent domain; and dis-

carded the alternatives in favor of the City's retaining the land and recovering gthe $258,000 in a "forfeiture" by the Calls.[8]

We turn to the decisions in which the trial court found "no clear direct authority on the appropriate relief to be given" to a public agency when a contract with it is found to be void for a violation of section 1090. (See fn. 8, *ante*.) They establish, as the court observed (see *ibid*.), that injunctive relief will lie if the contract has not been performed. (see *Moody v. Shuffleton*, *supra*, 203 Cal. 100 at pp. 100, 105, 262 P. 1695: *Berka v. Woodward*, *supra*, 125 Cal. 119 at pp. 121, 129, 57 P. 777;

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[8] This reasoning is shown by the following passages in the memorandum decision:

"There appears to be no clear direct authority on the appropriate relief to be given a public body when one of its members has violated . . . Section 1090. If the transaction remains unexecuted[,] the appropriate relief would be to enjoin its consummation. Here the transaction has been fully executed. There is no doubt Call must be required to pay over to the City the funds which he has improperly received. The question is, what should be done with the real property which was the subject of the transaction. If Call were allowed to retake the property the City would presumably be left with the necessity of exercising eminent domain to condemn the property at this time, if the City chooses to pursue the plan to create the public park . . . .

"If the Court were empowered to do so it would be inclined to require that Call pay over to the City the funds he has received and that the City be required promptly to bring an action in eminent domain with the valuation date to be fixed at August, 1973, taking into account any diminution in value caused by the existence of the . . . easement. However, there appears to be no authority for such powers to be exercised by this Court in this proceeding.

"The only alternative will result in a forfeiture by [the] Calls, but perhaps that is an appropriate result in this case. The judgment will therefore be that defendant Call has violated the provisions of Section 1090 . . . and that judgment should therefore be rendered in favor of the City and against defendants Call in the amount of $258,000, together with interest from August 21, 1973. . . ."

Hobbs, Wall & Co. v. Moran, *supra*, 109 Cal.App. 316 at pp. 317, 321, 293 P. 145; *Stockton P. & S. Co. v. Wheeler*, *supra*, 68 Cal.App. 592 at pp. 595-596, 603, 229 P. 1020.) They also establish that where it has been performed by both sides, as in the present case, the agency is entitled to recover the consideration it has paid or delivered to the other contracting party. (*Miller v. City of Martinez*, *supra*, 28 Cal. App.2d 364 at pp. 370-372, 82 P.2d 519; *County of Shasta v. Moody*, *supra*, 90 Cal.App. 519 at pp. 519-520, 523-524, 265 P. 1032.

In the latter situation, the agency may retain the value of the other party's performance of the contract without alleging or proving its restitution or an offer to restore it to him. (*Miller v. City of Martinez*, *supra*, 28 Cal.App.2d 364 at pp. 370-372, 82 P.2d 519; *County of Shasta v. Moody*, *supra*, 90 Cal.App. 519 at pp. 523-524, 265 P.2d 1032; see also *Berka v. Woodward*, *supra*, 125 Cal. 119 at pp. 124-127, 57 P. 777.) None of the cited decisions describes this result as a "forfeiture" by the other party of the value received from the agency, but it amounts to one. The result has been justified on the principles that his interests must yield to the paramount "rights of the public"; that "no court shall lend its aid to a man who grounds his action upon an . . . illegal act"; that there is consequently "no place for equitable considerations, presumptions or estoppels" in the action; and that restitution to the party who contracted with the agency will therefore not be permitted on a theory of implied contract. (*Berka v. Woodward*, *supra*, at pp. 127-129, 57 P. 777; *Miller v. City of Martinez*, *supra*, at pp. 370-371, 82 P.2d 519; *County of Shasta v. Moody*, *supra*.)

In each of these decisions, however, the contract found to be void was between a public agency and a vendor for the purchase of goods or services by the agency; the consideration retained by the agency was the goods or services themselves, which had been delivered or rendered to the agency when the vendor performed and the consideration recovered by the agency, and forfeited by the vendor, was the money the agency had paid for the goods or services when it performed. (See *Berka v. Wood-*

ward, supra, 125 Cal. 119 at p. 121, 57 P. 777 [building materials]; *Miller v. City of Martinez, supra*, 28 Cal. App.2d 364 at pp. 365-366; 82 P.2d 519 [petroleum products]; *County of Shasta v. Moody, supra*, 90 Cal.App. 519 at p. 520, 265 P. 1032 [job printing and supplies]; see also *Moody v. Shuffleton, supra*, 203 Cal. 100 at pp. 100-101, 262 P. 1695 [job printing and supplies]; *Hobbs, Wall & Co. v. Moran, supra*, 109 Cal.App. 316 at p. 317, 293 P. 145 [merchandise and supplies].)

There are significantly distinguishable features in the present case. The contract found to be void was between IGC and the City, and the Calls were not parties to it. It was for the acquisition of land by the City from IGC, not from the Calls as vendors. The consideration the City retains is the land, which it received when the contract was performed by IGC. The consideration it recovers in the "forfeiture" by the Calls is the money paid to them for the land by IGC, not by the City.

The "forfeiture" by the Calls results from the trial court's reasoning that "Call must be required to pay over to the City the funds which he has improperly received." (See fn. 8, *ante*.) The section 1090 decsions would support that requirement if Call and the City were the parties to the contract found to be void, and if he had received the funds from the City when the contract was performed. The decisions do not support a requirement that he pay "to the City" funds which he received from a third person in the performance of a contract to which he was not a party. It thus appears that the trial court applied two-party law in a three-party situation to which it may not be applied with the results the court reached. Stated another way in the context of the court's findings and conclusions, the decisions dealing with contracts found to be void for a violation of section 1090 do not support a "forfeiture" by one who was not a party to the contract; who did not "conspire" or commit "fraud" in its inducement, execution, or performance; and who violated section 1090 by acquiring a financial interest in the contract, but who has been absolved from wrongdoing in connection with it. We are therefore required to reverse the judgment insofar as it orders the Calls to pay the City $258,000 plus interest.

The section 1090 decisions would support a "forfeiture" by IGC, as the other party to the contract found to be void, if it were in a position comparable to the vendors of goods or services in those cases. It is not in that position because of the unique features found here, but the inquiry cannot end at this point. Notwithstanding the fact that IGC's contract with the City has been found void, it obligated IGC to convey fair value to the City in the form of land which was suitable for use as a public park. There is substantial evidence supporting an inference that the 1.1-acre parcel IGC acquired from the Calls and conveyed to the City, through Cebert, represents less than fair value because of the undetermined—but obvious—extent to which its value has been diminished by the cross and the easement on the land.[9] There is also substantial evidence supporting inferences that the easement actually protects the location and existence of the cross, and that the land is consequently unsuitable for use as a municipal park because of the constitutional proscriptions which preclude the display of a religious symbol on public property. (See *Fox v. City of Los Angeles*, *supra*, 22 Cal.3d 792 at pp. 797-799, 150 Cal.Rptr. 867, 587 P.2d 663; see also *id.*, at pp. 802-813, 150 Cal.Rptr. 867, 587 P.2d 663 (conc. opn.) and authorities there cited.)

Because of the undisputed fact that the IGC allowed the land to be burdened with the easement before having it conveyed to the City pursuant to the contract, the evidence supports a terminal inference that IGC breached the contract in performing it. The trial court expressly acknowledged this in its memorandum decision, but concluded that a remedy for breach by IGC did not lie in the present action because plaintiffs had not pleaded it; that it consequently provided no basis for a judg-

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[9] The trial court observed in its memorandum decision that "[w]ith the cross and unrestricted easement on the property, . . . the property was virtually undevelopable and therefore of virtually no commercial value." Although this observation was not expressed in a formal finding of the actual value of the land, it is clearly supported by the evidence.

ment against IGC in the action; and that the remedy for it was to be asserted in other litigation if the City desired to pursue it.[10] These conclusions are reflected in finding No. 52, where the court determined that "IGC . . breached no duties owed to the City . . . , complied with all conditions imposed on it by the City . . . , and performed all obligations owed by it to the City . . . , *in the issues raised by the pleadings* . . ." (See fn. 6, ante [italics added here].)

The result permits IGC to escape liability to the city for an apparent—if not formally determined—breach of the contract

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[10] The court stated in the memorandum decision as follows: "IGC does appear to have been guilty of one breach of its agreement . . . [with the City] . . . . Though IGC was motivated solely by a desire to obtain a building permit and to protect its development, . . . it recognized that the City . . . was interested in making a public park at the top of the hill. IGC therefore used that as its inducement to the City as, for example, in the letter of November 3, 1972 offering 'to make a major effort to preserve the Albany Hill top for public use,' and promising the City 'a unique, superb and useful view park for the public enjoyment.' The sales agreement with Call . . . called for title free and clear of all liens, encumbrances, easements, et cetera. Notwithstanding this, . . . IGC consented to a demand of Call . . . that title be taken subject to . . . an unrestricted easement of access by the Albany Lions Club to and for maintenance of . . . [the] . . . cross which had been erected on the Call property.

"The President . . . of IGC [Wilson] testified that Call was allowed to impose the burden of the easement because IGC didn't care what restrictions might be placed upon the property as long as they did not constitute a potential threat to the development of IGC's property . . . . Allowing the property to be so encumbered can hardly be said to be consistent with 'a major effort to save and preserve the Albany Hill top for public use,' given the legal and practical complications thus entailed. However, the Court perceives no cause of action in plaintiffs' complaint embracing such a breach; and it is concluded . . . that in this action no judgment can or should be rendered against IGC. This decision, however, is without prejudice to any right of action the City may have by [way of] specific performance or damages . . . by reason of any such breach."

conceived by it, and sold by it to the City for its (IGC's) own advantage in protecting its project from competitive development, on the basis that such breach and liability were not expressly pleaded by plaintiffs in their successful action founded on the premise that the contract was void for a violation of section 1090. We raise an issue as to this result, for the first time on appeal but in our discretion, because its prospects for detriment to the City present an important question involving the public interest. (See *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App. 3d 1, 5, 97 Cal.Rptr. 431; *Isthmian Lines, Inc. v. Schirmer Stevedoring Co.* (1967) 255 Cal.App.2d 607, 610, 63 Cal.Rptr. 458; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1938) 34 Cal.3d 412, 417, 194 Cal.Rptr. 357, 668 P.2d 664.) We conclude that the result is not warranted by the narrow view on which it was based; that deferment of the questions whether IGC breached the contract, and whether it should be liable to the City therefor, is not in the public interest; that the questions should be litigated and resolved in the present action; and that plaintiffs' failure to plead them may readily be remedied by amendment of the complaint to conform to the proof.

IGC's liability to the City in damages for a breach—if pleaded by amendment and proved, as hereinafter authorized—would not impose a "forfeiture" on it within the meaning of the section 1090 decisions previously cited, but it would achieve the equivalent by adaptation to the unique features of this case. It would otherwise be consistent with those decisions because it involves only the *remedy* to be applied where—as they hold—a contract with a public agency is void if an officer of the agency is "financially interested" in it within the meaning of the statute. Such liability would also be consistent with the rule that a void contract may be enforced if the result thereof will be justified by such considerations as the relative culpability of the parties to the contract, the prospect of unjust enrichment if it is not enforced, and the policy underlying the statute involved. (See *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 150-151, 308 P.2d 713; *Homestead Supplies, Inc. v. Executive*

Life Ins. Co. (1978) 81 Cal.App.3d 978, 990-991, 147 Cal.Rptr. 22.) We expressly hold that these considerations warrant pursuit of a remedy against IGC, on behalf of the City and in the present action, for breach of the contract embodied in the $600,000 plan.

The sixth count in Plaintiffs' complaint is captioned "Breach of Fiduciary Duty," but it includes allegations to the effects that IGC offered the $600,000 plan to the City; that the City accepted; that there was an exchange of consideration; and that IGC's actions in performing the plan caused "direct and consequential damages" to the City which included (but were "not necessarily limited to") the amount paid for the 1.1-acre parcel in "excess of fair market value . . . ." In light of these allegations and the evidence, it is the sixth count which may appropriately be amended to include allegations (1) that IGC breached the contract by conveying an encumbered title to the City and (2) that the City was damaged by the breach in an amount or amounts to be ascertained.

This amendmen is not precluded by the mere label heretofore appended to the sixth count. (Cf. *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 833, 134 Cal.Rptr. 839.) The amended count will not impermissibly state a new cause of action because it will relate back to "the same general set of facts" which were initially alleged in it. (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600-601, 15 Cal.Rptr. 817, 364 P.2d 681; cf. *Earp v. Nobmann* (1981) 122 Ca.App.3d 270, 286, 175 Cal.Rptr. 767.) For the same reason, the amended count will not be barred by any statute of limitations. (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932 935-940, 136 Cal.Rptr. 269, 559 P.2d 624; *Austin v. Massachusetts Bonding & Insurance Co., supra.*) By way of asserting their standing to sue on the sixth cause of action as to taxpayers, plaintiffs initially alleged in it that they had served the City Council with a demand that "said Council authorize and direct the institution . . . of suit on behalf of defendant City . . . to vindicate all rights of the City arising out of the . . .

transaction" involving the $600,000 plan. It was agreed at the trial that plaintiffs had "made a timely demand on the City . . . to bring this action . . . ." They thus have standing to proceed on the sixth cause of action if it is amended as described.

On the remand hereinafter ordered, the trial court will accordingly authorize the described amendment if plaintiffs apply for leave to effect it. IGC may thereafter plead to the sixth cause of action as amended, and the issues thus joined (whether IGC breached the contract and whether it is consequently liable to the City) are to be tried and resolved in due course. (See Code Civ.Proc., § 469; *Mountain States Creamery Co. v. Tagerman* (1952) 39 Cal.2d 355, 356-357, 246 P.2d 21; 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 1059, p. 2635.)

It will not be necessary to retry questions pertaining to whether a violation of section 1090 occurred in fact, nor its consequences, and the trial court's previous determinations in these respects will stand. An issue may remain as to whether the Calls should be obligated to pay all or part of the $258,000 to IGC, as distinguished from the City. There are no cross-pleadings shown in the present record which will permit that result. It is therefore the Calls and IGC as private parties, not the City, who are to be relegated to other litigation for the resolution of any residual disputes between them.

VIII

We turn to plaintiffs' appeal. They contend that the trial court erred in failing to hold the corporate defendants liable to the City, jointly with the Calls, on either of two theories. Joint liability with the Calls is not a possibility because of the result reached on their appeal, but the theories should be discussed. One is the theory that the corporate defendants acted as the City's agents in the performance of the contract embodied in the $600,000 plan, and that they should be held liable to it for breaching the duties imposed on them as agents. The other is the theory that they acted as trustees for the City, and that

they should be held liable for breaches of trust. Plaintiffs pleaded both theories against the corporate defendants, but the trial court determined in conclusion of law No. 2 that "IGC was neither the agent nor the trustee of the City" in the performance of the $600,000 plan. (See fn. 6, *ante*.) This determination is supported by the evidence. The corporate defendants are not liable to the City on either theory advanced by plaintiffs.

Plaintiffs also contend that the judgment erroneously deniees them injunctive relief restraining IGC from further construction of its project. The trial court correctly concluded that the use permit and the building permit were valid as issued, and that their validity was not affected by any "failure of IGC" to have performed its contractual obligations to the City. (See fn. 7, *ante*.) We therefore affirm the judgment insofar as it denies injunctive relief.

In the interests of clarity, we also affirm the judgment with regard to the trial court's determinations that section 1090 was violated,and that the contract between IGC and the City was consequently void; and in other respects in which it is silent, but which have not been challenged on either appeal.

* * *

The judgment is affirmed insofar as it reflects the determination by the trial court that the contract entered into between the City of albany and Interstate General Corporation on November 13, 1972, is void because defendant Hubert F. Call was financially interested in it within the meaning of Government Code section 1090; insofar as it denies relief in the action as to the defendants Carlevaro, Hein, and Howell; and insofar as it denies injunctive relief in the action. The judgment is otherwise reversed. The cause is remanded to the trial court with directions to hear and decide other issues consistent with this opinion. Plaintiffs and appellants Bruce Thomson et al. shall recover their costs on both appeals. The other parties shall bear their own costs.

CALDECOTT, P.J., and POCHE, J., concur.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

No. 448248-8

BRUCE THOMSON, *et al.*,

Plaintiffs,

v.

CITY OF ALBANY, CALIFORNIA,
a municipal corporation, *et al.*,

Defendants.

AND CROSS-COMPLAINT

SIGNED COPY FILED
May 2, 1978

JUDGMENT

This cause came on regularly for trial on January 3, 1978, in Department 20 of the above-entitled Court, the Honorable Robert H. Kroninger, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiffs appeared by Cooper, White & Cooper, E. Garth Black and Neil L. Shapiro; defendants Interstate General Corporation, Interstate General Development, Interstate Albany Corporation, and Cebert Properties, Inc., appeared by the Law Offices of Edward Fitzsimmons, Richard Heimann; defendants Hubert F. Call and Ruth L. Call appeared by Jerome Berg; defendants City of Albany, Joseph Carlevaro, George Hein and Lewis Howell appeared by Lawrence Saler, City Attorney of the City of Albany, and by Den-Dulk, Douglas & Anderson, Robert T. Anderson; and defendant Jack Krystal appeared by Jack Schwartz. Evidence, both oral and documentary, having been presented by all parties, plaintiffs having dismissed the action

as to Jack Krystal, the Court having granted the motions of Joseph Carlevaro, George Hein and Lewis Howell for judgment at the close of plaintiffs' case and judgment having been entered accordingly, the cause having been submitted for decision, and the Court having caused to be made and filed its written Findings of Fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs, on behalf of the City of Albany, have and recover from defendants Hubert F. Call and Ruth L. Call the sum of $258,000 with interest thereon at the rate of 7% per annum from August 21, 1973 until paid, together with allowable costs and disbursements;

2. Plaintiffs take nothing by their complaint from defendants Interstate General Corporation, Interstate General Development, Interstate Albany Corporation, or Cebert Properties, Inc., and that said defendants have and recover from plaintiffs allowable costs and disbursements;

3. Plaintiffs' application for any award of attorneys' fees shall be and is deferred until the judgment in this action becomes final.

Dated:

Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

No. 448248-8

BRUCE THOMSON, *et al.*,

Plaintiffs,

v.

CITY OF ALBANY, CALIFORNIA,
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Defendants.

AND CROSS-COMPLAINT

ENDORSED FILED
May 2, 1978
RENE C. DAVIDSON, County Clerk
Rosalynn Kennon, Deputy

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter having been submitted on briefs after bifurcated trial on plaintiffs' complaint only, and plaintiffs having dismissed the action against defendant Krystal and the Court at the close of plaintiffs' case having granted the motion for judgment of defendants Howell, Hein and Carlavaro, the Court makes the following findings of fact:

FINDINGS OF FACT

1. Plaintiffs, and each of them, were at all times relevant to this litigation residents of the City of Albany, and within one year prior to the commencement of this litigation, plaintiffs, and each of them, paid a tax to the City of Albany.

2. Plaintiffs, and each of them, made a timely demand on the City of Albany to institute and commence the subject litigation, and the City of Albany refused to institute or commence the subject litigation.

3. Plaintiffs timely instituted and commenced the subject litigation after the denial by the City of Albany of plaintiffs' demand that the City of Albany institute and commence the subject litigation.

4. Defendant Joseph Carlevaro ("Carlevaro"), George C. Hein ("Hein"), Lewis M. Howell ("Howell") and Hubert F. Call ("Call"), and each of them, were members of the Albany City Council during the years 1972 and 1973.

5. Defendant Ruth L. Call was at all times relevant and is the lawful wife of defendant Hubert F. Call.

6. Defendant City of Albany was at all times relevant and is a municipal corporation, authorized and existing under and by virtue of the laws of the State of California.

7. Defendant Interstate General Corporation ("IGC") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and conducted business within the County of Alameda.

8. Defendant Cebert Properties, Inc. ("Cebert") was at all times relevant and is a corporation organized and existing under and by viture of the laws of the State of Deleware, and conducted business within the County of Alameda.

9. Defendant Interstate Albany Corporation ("IAC") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of California, and has its principal place of business, and conducted business, within the County of Alameda.

10. Defendant Interstate General Development ("IGD") was at all times relevant and is a corporation organized and existing under and by viture of the laws of the State of Delaware, and conducted business within the County of Alameda.

11. Defendant IAC was at all times relevant and is a subsidiary of IGD. IGD was at all times relevant and is a subsidiary of IGC. The stock of Cebert was at all relevant times and is owned by James J. Wilson as trustee for the benefit of the children of Robert T. Wilson, brother of James J. Wilson. James J. Wilson was at all times relevant and is the president of IGC, IGD and IAC, and was and is a director of IGC, IGD, IAC and Cebert. For all relevant matters, IGC, IGD, IAC and Cebert, and each of them, acted as agents and servants for each other, and had unity of purpose and concurrence of action.

12. For more than one year prior to April, 1972, the City of Albany and residents of the City of Albany had an interest in and plans for an "overlook" park on Albany Hill. The park plans of that period included land owned by defendants Ruth Call and Hubert Call.

13. Prior to April, 1972, IGC owned certain real property at the western base and along the western slope of Albany Hill, a hill located in the City of Albany, County of Alameda, which it wished to develop with high-rise residential construction totaling approximately 2,500 individual dwelling units, and with related parking facilities and commercial development. Inquiries were made in approximately April of 1972 of James Turner ("Turner"), City Administrator of the City of Albany, by Robert O'Donnell, a planner acting at the request of and on behalf of IGC, as to the steps necessary to apply to the City for permission to construct the aforementioned development.

14. On or about May 15, 1972, by Ordinance No. 72-05, the Albany City Council ("Council") ordered that no permit for the erection of any building or structure could be issued by the City for the area denominated as the Hill Control District by Ordinance 61-011 unless and until a use permit was first obtained from the Council. By Ordinance 72-013, passed on or about September 5, 1972, the Council extended the effectiveness of Ordinance 72-05 for an additional eight months beyond its September 15, 1972 termination date. The land which IGC

wished to develop, as well as the relevant land owned by Ruth and Hubert Call, were within the Hill Control District.

15. In or about July, 1972, IGC applied to the Council for a use permit, to allow it to proceed with its planned development. Between July and November of 1972, the Council held public hearings concerning the pending IGC application.

16. On or about October 24, 1972, the City, through Lawrence Saler ("Saler"), City Attorney for the City of Albany, and James Turner, communicated to IGC the proposed conditions under which the City was willing to issue the requested use permit. (Exhibit 2.) Condition 5 required IGC to deed to the City two hilltop acres and four creekside acres for use as parkland. Condition 6 required IGC to preserve and maintain as perpetual open space, with recordation of appropriate deed restrictions, 18 acres of its land, and to allow public access to that land for passive recreational pursuits during all hours at which adjacent parks were open to the public. Conditions 7 and 8 required IGC, at its own expense, to make improvements on the lands described in Conditions 5 and 6.

17. On or about November 3, 1972, IGC rejected in part the proposed conditions of the City, and offered a counterproposal by letter to the Council, as well as by proposed conditions. (Exhibit 4.) The proposed conditions were silent as to privately-owned open space, with public access, but did offer to dedicate and deed two hilltop acres to the City as parkland. The accompanying letter of the same date stated:

> "As an alternative to the public open space on a portion of our property, we offer. . . the following:
>
> "Should our application be granted, we agree to allocate $600,000.00 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgement, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City of Albany's park and Overlook Park."

18. On or about November 10, 1972, Saler and Turner, on behalf of the City, rejected in part the conditions proposed by

IGC for its requested use permit, and proposed conditions to IGC. Condition 5 sought the same land by dedication and deed as had the City's proposed conditions of October 24, 1972, and Condition 6 sought the same 18 acres of perpetual open space, privately owned and maintained, but open to the public. Condition 7 required IGC to improve and maintain the perpetual open space referenced in Condition 6.

19. On or about November 12, 1972, IGC rejected in part the proposed conditions of the City, and offered a counter-proposal by letter to the Council, as well as by proposed conditions. The proposed conditions were silent as to privately-owned open space, with public access, but did offer to dedicate and deed two hilltop acres to the City as parkland. The accompanying letter of the same date stated that IGC would establish the undeveloped land as perpetual open space, with appropriate deed restrictions, and that IGC would maintain said property, but declined to allow public access to that area. The same letter renewed the offer of November 3, 1972 to dedicate and deed two hilltop acres to the City as parkland and "to allocate $600,000.00 for the purpose of first purchasing additional private property to encompass the proposed Overlook Park of Albany Hill, all at or above the 200' contour of the hill. . ." for the use by the City as parkland. The same letter offered, as an alternative to the two hilltop acres and the $600,000 allocation, to dedicate and deed to the City the four creekside acres referenced in the City's original proposed Condition 5. IGC's proposal to the City of Albany includes the implied condition that the land to be actually tendered to the City pursuant to the $600,000 Plan would be constitutionally suitable for ownership by a city and use by it as a public park.

20. On occasion, Hubert Call asked the City Attorney whether or not he could speak on certain issues or vote on certain issues pending before the Albany City Council, and on such occasions was advised not to speak or vote if real property in which he had a financial interest was involved in the pending issues. Call followed such advice when it was sought and given.

Call was told by the City Attorney that he could discuss and vote on IGC's applications for rezoning and for Use Permit No. 20.

21. On November 13, 1972, at a regularly scheduled Council meeting, the Council, with affirmative votes by Councilmen Call, Hein, Howell and Carlevaro, granted a request by IGC for a rezoning of its property from R-1-H-C [single-family residences] to R-3-H-C [high density, high-rise development] to allow the planned development. Thereafter, at the same meeting, with the same affirmative votes, the Council granted Use Permit No. 20 to IGC, approving with minor modification the proposed conditions submitted by IGC on or about November 12, 1972. Thereafter, at the same meeting, with affirmative votes by Councilmen Clark, Carlevaro, Hein and Howell, and with an abstention by Councilman Call, the Council accepted the offer of IGC made in its letters of November 3 and November 12, 1972 to allocate $600,000 ("the $600,000 Plan") for the purchase of private property to supplement the two hilltop acres owned by IGC, to encompass the proposed Overlook Park of Albany Hill.

22. The offer of the $600,000 Plan, and the acceptance thereof by the City of Albany on November 13, 1972, did not vest in the City of Albany any right or power to control the real property acquisitions of IGC in its performance of the $600,000 Plan. At no time did the City of Albany attempt to control any act of IGC relating to said real property acquisitions. IGC was neither the agent nor the trustee for the City of Albany or for any other person or entity as a consequence of the $600,000 Plan.

23. Among the parcels of real property within the boundaries established by the $600,000 Plan was a parcel of real property owned jointly by Councilman Hubert Call and Ruth Call. Such real property ownership by Ruth and Hubert Call within said boundaries was disclosed by Hubert Call to the other members of the City Council and to the public prior to

voting by the Albany City Council on the offer of IGC of the $600,000 Plan.

24. In mid-February, 1973, Eugene Hill ("Hill"), a vice president of IGC, IGD and Cebert, was sent by IGC to the Albany area to obtain a building permit for the project, to acquire or oversee the acquisition of property pursuant to the $600,000 Plan, and, in general, to get the proposed development constructed.

25. In futherance of IGC's performance under the $600,000 Plan, Hill retained Elliot Ball, an appraiser, to appraise the real property available that met the terms of the $600,000 Plan and the desires and needs of the parties. The only real property meeting said qualifications were a 2.1-acre parcel owned by Albany Hill Associates, a 1.1-acre parcel owned by Ruth and Hubert Call, and approximately 2 acres of an approximately 11.5-acre parcel owned by Golden Gate Hill Development Company.

26. Pursuant to his assignment, Elliot Ball appraised the three available parcels of real property, and submitted written reports of his appraisals to Hill. Ball appraised the parcel owned by Ruth and Hubert Call ("Call Parcel") at $63,800, appraised the upper portions of the parcel owned by Golden Gate Hill Development Company ("Golden Gate Parcel") at $31,900 per acre, and appraised the Albany Hill Associates parcel at $211,700.

27. On the basis of the Elliot Ball appraisals, Hill forwarded written offers to the owners of all three parcels. Hill offered $63,800 for the Call Parcel, $211,700 for the Albany Hill Associates parcel, and, while intending to follow the appraisal, offered $31,900 for the entire 11.5-acre Golden Gate Parcel. Each offer made was conditional in that each stated that "the closing of this offer will be a concurrent condition with the issuance of a complete building permit on all properties of the undersigned by the appropriate authorities of the City of Albany." Call and the Albany Hill Associates rejected said offers in writing, and submitted counteroffers. Golden Gate

Hill Development Company did not respond to the offer. At the same time Hill forwarded the offer to Call, Hill knew that Call was a member of the Albany City Council.

28. When the offers were rejected, expressly or by silence, Hill was instructed by James Wilson ("Wilson"), founder and president of IGC, to authorize a real estate broker to negotiate with the property owners to arrange purchases in satisfaction of the $600,000 Plan. Pursuant to said instructions, Hill authorized Jack Krystal ("Krystal"), a Marin County real estate broker, in writing to commence negotiations for the purchase of the available parcels of real property.

29. Krystal contacted Golden Gate Hill Development Company concerning Hill's offer, and was told that the offer was too low. Krystal advised that the offer was for the top two acres, not the entire parcel, and raised the offer to $40,000 for the two acres. His offer was rejected, and he was told no negotiations could continue in the absence of a further written offer. Krystal verbally invited a counteroffer to his offer of $40,000, suggesting a counteroffer of $100,000, but no counteroffer was made, and Krystal made no further written offers. Krystal then abandoned negotiations for the Golden Gate Parcel.

30. The City of Albany was aware, in 1973, that if Golden Gate Hill Development Company ever sought permission to develop portions of its approximately 11.5-acre parcel, such permission could probably be conditioned upon the deeding by Golden Gate Hill Development Company to the City of the upper 2 acres of the aforementioned parcel.

31. In response to Call's rejection of Hill's offer of $63,800, and in response to Call's written counteroffer of $360,000 for the Call Parcel, Krystal offered, in writing, $180,000 to $190,000 for the 1.1-acre Call Parcel. Thereafter, through verbal negotiations, Krystal and Ruth and Hubert Call agreed on $258,000 as the price of the Call Parcel. During the aforementioned negotiations, Krystal told Call that the Call Parcel would be deeded to the City for use as a park, pursuant to the $600,000 Plan.

32. The agreement between Ruth and Hubert Call and Krystal was reduced to writing on June 25, 1973 in the form of a Real Estate Purchase Contract and Receipt for Deposit (Exhibit 31), in which IGC obligated itself to pay $258,000 to Ruth and Hubert Call for the Call Parcel. Said contract was "conditioned upon purchaser being issued all necessary permits to a project located adjacent to this property."

33. Neither the IGC proposal to the City of Albany nor the Real Estate Purchase Contract and Receipt for Deposit between IGC and Ruth and Hubert Call required that the Call Parcel be offered to the City as part performance of the $600,000 Plan, nor did either require that the City accept the Call Parcel if offered to the City burdened with a cross and with an easement for the maintenance of the cross for the benefit of a private service club. Money could have been tendered in complete satisfaction of the $600,000 Plan.

34. In response to Albany Hill Associates' rejection of Hill's offer of $211,700, and in response to Albany Hill Associates' counteroffer of $450,000 for its parcel, Krystal offered $280,000 or $290,000. Thereafter, through verbal negotiations, Krystal and Albany Hill Associates agreed on $340,000 as the price of the Albany Hill Associates parcel. On June 25, 1973, said agreement was reduced to writing. (Exhibit 32.) Said contract was "conditioned upon purchaser being issued all necessary permits to a project located adjacent to this property."

35. In 1973, two consolidated lawsuits against IGC, which raised issues unrelated to the instant litigation, were settled, and, as part of the settlement, IGC agreed to deed to the City of Albany concurrently with the issuance by the City of Albany of a building permit for the project the approximately 4-acre creekside parcel referenced in the negotiations for Use Permit #20. Said Parcel was conveyed to the City of Albany concurrently with the issuance to IGC of the initial building permit.

36. On or about August 17, 1973, Ruth and Hubert Call submitted escrow instructions (Exhibit 11) to the escrow

holder, conveying a Grant Deed to Cebert for the Call Parcel (Exhibit 19) and a Grant Deed to the Albany Lions Club and Lions International for an easement on the Call Parcel for ingress and egress for the maintenance of a cross (Exhibit 18), and directing said escrow holder to deliver said deeds to the grantees upon deposit with the escrow holder of the $258,000 sale price for the Call Parcel. On or about the same date, Albany Hill Associates also submitted escrow instructions to the escrow holder. (Exhibit 13.)

37. On or about August 23, 1973, the City submitted escrow instructions to the escrow holder, conveying a Building Permit for the first phase of the IGC development, and instructing the escrow holder to transmit said Building Permit to IAC when the escrow holder was able to transmit to the City $68,012.35 (Building Permit application fee), $2,000 (the unexpended balance of the $600,000 Plan), grant deeds for the two hilltop acres, the Call Parcel, the Albany Hill Associates Parcel, and the four-acre creekside parcel which IGC agreed to convey in settlement of unrelated litigation, and a copy of the Building Permit after execution of same by the owner, architect or builder of the development. (Exhibit 22.)

38. On or about August 23, 1973, IAC submitted escrow instructions to the escrow holder, referencing anticipated deposits of $600,000 and $68,012.35, and instructing the escrow holder to use the $600,000 to fulfill instructions submitted by sellers (Ruth and Hubert Call, Albany Hill Associates), with the balance to the City, and to deliver to the City $68,012.35, once the escrow holder obtained possession of the issued Building Permit for the first phase of the development. (Exhibit 12.)

39. The foregoing escrow instructions of IAC and the City were in reference to escrow number OK-220776, while the instructions of Albany Hill Associates and Ruth and Hubert Call were in reference to escrow numbers OK-220776A and OK-220776B, respectively. The escrow holder was Title Insurance and Trust Company, Oakland, California. The aforementioned escrow or escrows closed on or about August 24, 1973,

and the grant deeds from Ruth and Hubert Call to the Albany Lions Club, Lions International, and to Cebert, were recorded in that order on the same date. The grant deed from Albany Hill Associates to Cebert was recorded on the same date, as were grant deeds from Cebert to the City concerning the Call Parcel and the Albany Hill Associates parcel. The aforementioned grant deeds from Ruth and Hubert Call were signed by them on August 17, 1973, and the deed of easement from Ruth and Hubert Call to the Albany Lions Club and Lions International was recorded ahead of the deed from the Calls to Cebert.

40. Prior to the formal close of escrow, with the attendant conveyances of real property and delivery of funds and the Building Permit, the grant deed from Cebert to the City had to be accepted formally by the City pursuant to Government Code § 26281. On August 21, 1973, the Council adopted Resolution 73-76, a formal resolution entitled "A Resolution of the Council of the City of Albany Accepting a Corporation Grant Deed from Cebert Properties, Inc., a Delaware Corporation, and Authorizing the Mayor to Accept and Consent to Such Deed." (Exhibit 33.) Call abstained from voting on Resolution 73-76, on the advice of the City Attorney, stating that "he formerly held interest in a portion of the property involved" (Exhibit 9), but Councilmen Carlevaro, Clark and Howell voted in favor of the resolution, with Councilman Hein absent.

41. At the same meeting, the Council, at the request of Wells Fargo Bank, an institution providing the financing to IGC for the acquisitions under the $600,000 Plan, adopted Resolution 73-78, "A Resolution of the Council of the City of Albany Ratifying the Purchases of Certain Properties in Satisfaction of the Agreement with Interstate General Corporation" (Exhibit 34), affirmative votes being cast by Councilmen Carlevaro, Clark and Howell, with Call abstaining on the advice of the City Attorney, and with Councilman Hein absent. Said resolution stated, in relevant part, that "WHEREAS, the Council has examined the expenditures made for the purchases referred to herein . . . the Council of the City of Albany does

approve and ratify the purchases of the certain real properties more fully described in that Grant Deed referred to in Resolution No. 73-76."

42. At the same meeting, the Council, by Resolution 73-66, approved IGC's tract map for the project, with all councilmen present voting affirmatively.

43. On or about August 23, 1973, Turner issued Building Permit No. 1703 to IAC, said issuance being conditioned upon compliance with all building codes, all conditions of Use Permit No. 20 and all terms of or obligations created by the $600,000 Plan. (Exhibit 23.)

44. The purchases of real property by IGC through Cebert, and the conveyances of said real property to the City were in performance of a single agreement entered into between IGC and the City, the terms and conditions of which are reflected in IGC's letters of November 3, 1972 and November 12, 1972, the relevant resolutions adopted by the Council concerning the Use Permit, the $600,000 Plan, the acceptance of deeds from Cebert and the ratification of purchases made by IGC or Cebert of real property for conveyance to the City, the Use Permit, the Building Permit, the Real Estate Purchase Contracts and Receipts for Deposit concerning the Call Parcel and the Albany Hill Associates Parcel, and the escrow instructions concerning the purchase and conveyance of the Call Parcel and the Albany Hill Associates Parcel. Call had a financial interest in said agreement.

45. The Council meeting of August 21, 1973 was preceded by a work session of the Council open to the public but attended only by Saler, Turner and Councilman Howell, who was then also the Mayor of the City of Albany. At the work session, Mayor Howell was advised of the parcels being purchased pursuant to the $600,000 Plan, as well as the amount to be paid for each parcel. Specifically, Mayor Howell was advised that a total of only 3.2 acres would be purchased for $598,000, that Albany Hill Associates would receive $340,000, or $3.72 per square foot, that Ruth and Hubert Call would receive $258,000,

or $5.38 per square foot, and that, since the purpose of the meeting was to consider acceptance of the real property by the City and a determination by the Council that the values indicated were reasonable, he should ask Turner at the meeting itself to delineate the cost relationships just reviewed in order that all members of the C ouncil could be fully apprised. At the meeting of August 21, 1973, however, the Mayor made no such request of Turner, and the other Councilmen were not advised of the aforementioned details of the transactions.

46. Had the City refused to accept the Call Parcel in performance of the $600,000 Plan, IGC would have retained said real property under its ownership for the protection of the privacy and visual integrity of its project at the western base of Albany Hill.

47. In approximately 1971, Call allowed the erection by the Albany Lions Club on the Call Parcel of a metal and glass cross, of approximately fifteen to twenty feet in height. Said cross remained on said property through the trial of the subject litigation. An electrical permit was issued to the Albany Lions Club when the cross was erected, and the cross was constructed so that it could be illuminated by the Albany Lions Club.

48. When Ruth and Hubert Call contracted with IGC for the sale of the Call parcel, there existed no express easement on the Call Parcel concerning or relating to the aforementioned cross, and the written agreement between Ruth and Hubert Call and IGC, dated June 25, 1973, was silent concerning the cross.

49. Shortly before the close of the aforementioned escrow, Call insisted that the Call Parcel be burdened with an easement for the maintenance of the cross, and IGC offered no objection. By Grant Deed dated August 17, 1973, recorded on or about August 24, 1973, Ruth and Hubert Call granted to the Albany Lions Club, and to Lions International, "an easement for ingress and egress to maintain the existing cross standing on a portion" of the Call Parcel.

50. When the City accepted the deed to the Call Parcel from Cebert on August 21, 1973, by Council Resolution No. 73-76, and when the City took title to said parcel by recordation of the Grant Deed on or about August 24, 1973, the aforementioned cross was upon the Call Parcel.

51. The act of the City in accepting the deed to the Call Parcel had a secular purpose—the City accepted the Call Parcel for use by the public as a park.

52. IGC, IAC, IGD and Cebert breached no duties owed to the City of Albany, complied with all conditions imposed upon it by the City of Albany, and performed all obligations owed by it to the City of Albany, in the issues raised by the pleadings in the subject litigation.

53. No defendant in the subject litigation was involved in a conspiracy to defraud the City, to breach any fiduciary duties owed to the City, to cause a violation of Government Code § 1090, or to cause an illegal expenditure of public funds.

54. No defendant in the subject litigation was guilty of perpetrating a fraud, actual or constructive, on the City.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

1. Plaintiffs, and each of them, had at the commencement of this action, standing to bring said action, and complied with all requirements and prerequisites for the bringing of said action. Plaintiffs, and each of them, were therefore authorized by law to commence said action for the benefit of the City of Albany.

2. With respect to the $600,000 Plan, and the satisfaction of its obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany.

3. Call's financial interest in the agreement as set forth in Finding of Fact No. 44 between IGC and the City was an

interest proscribed by Cal. Gov. Code § 1090, which provides that "City officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

4. Ruth and Hubert Call sold the Call Parcel to the City of Albany through Cebert as a conduit, but the use of a conduit creates no difference in substance and very little difference in form from a direct sale, and both methods of conveyance are proscribed by Gov. Code § 1090.

5. Because of the proscribed financial interest of Call in the agreement between IGC and the City, pursuant to which Ruth and Hubert Call received $258,000 for the Call Parcel, and because the Call Parcel was owned by Ruth and Hubert jointly, and sold and conveyed by them jointly, Ruth and Hubert Call are indebted to the City in the full amount received by them in the performance of the agreement, which amount is $258,000. Furthermore, because said liability is for a liquidated amount, received by Ruth and Hubert Call pursuant to specific action of the City on a specific date, Ruth and Hubert Call are liable to the City for interest on the $258,000 at the rate of 7% per annum from August 21, 1973 until paid in full. Finally, because the agreement under which Ruth and Hubert Call received the aformentioned monies was prohibited by statute, specifically Gov. Code § 1090, Ruth and Hubert Call are not entitled to a return of their property given in consideration for said agreement, and title to the Call Parcel remains and shall remain in the City of Albany.

6. Councilmen Howell, Carlevaro and Hein exercised bad judgment in their consideration and acceptance of the $600,000 Plan in November, 1972, but no liability to the City arose thereby.

7. Councilmen Howell and Carlevaro are not liable to the City in any amount or at all for their acceptance of the grant deeds from Cebert and in their ratification of the real property purchases made pursuant to said $600,000 Plan, because of the terms of the $600,000 Plan, and the discretion vested in IGC

thereby. Said councilmen could not have failed to so accept and ratify.

8. The Use Permit issued by the City of Albany to IGC on November 13, 1972 was issued in conformance with all laws of the City of Albany, the County of Alameda, and the State of California, and was and has been, at all times since its issuance, a valid and proper use permit.

9. The issuance of a building permit in the City of Albany is a ministerial act, provided the applicant has complied with any and all conditions placed on such issuance by the City of Albany, and has paid all necessary fees.

10. The building permit issued to IAC in August of 1973 was issued in conformance with all laws of the City of Albany, the County of Alameda, and the State of California, and was and has been, at all times since its issuance, a valid and proper building permit.

11. No alleged failure of IGC, IGD or IAC to perform properly and fully any obligations owed by any of them to the City of Albany under the $600,000 Plan, nor any alleged or purported breach by any of them of any such obligation, affects the validity of either the use permit or the building permit issued by the City of Albany.

12. IGC, IAC, IGD and Cebert breached no duties to the City in the matters raised by the pleadings in the subject litigation, and are not liable to the City in any sum, or at all.

13. The primary effect of the acceptance of the Call Parcel by the City—the addition of 1.1 acres of land to the City's park system—neither advanced nor inhibited religion; rather, the primary effect was to provide additional park land to the City and had negligible, if any, effect on any religious freedom.

14. The acceptance of the Call Parcel by the City did not constitute excessive governmental entanglement with religion.

15. The acceptance by the City of real property encumbered by an easement for ingress egress for the maintenance of a cross did not constitute action in violation of the First Amendment to the United States Constitution or any law, statutory or decisional.

Let judgement be entered accordingly.

Dated: May 2, 1978.

ROBERT H. KRONINGER
Judge of the Superior Court